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Warren, Charles, 1868-1954.
The Supreme Court in United States history.

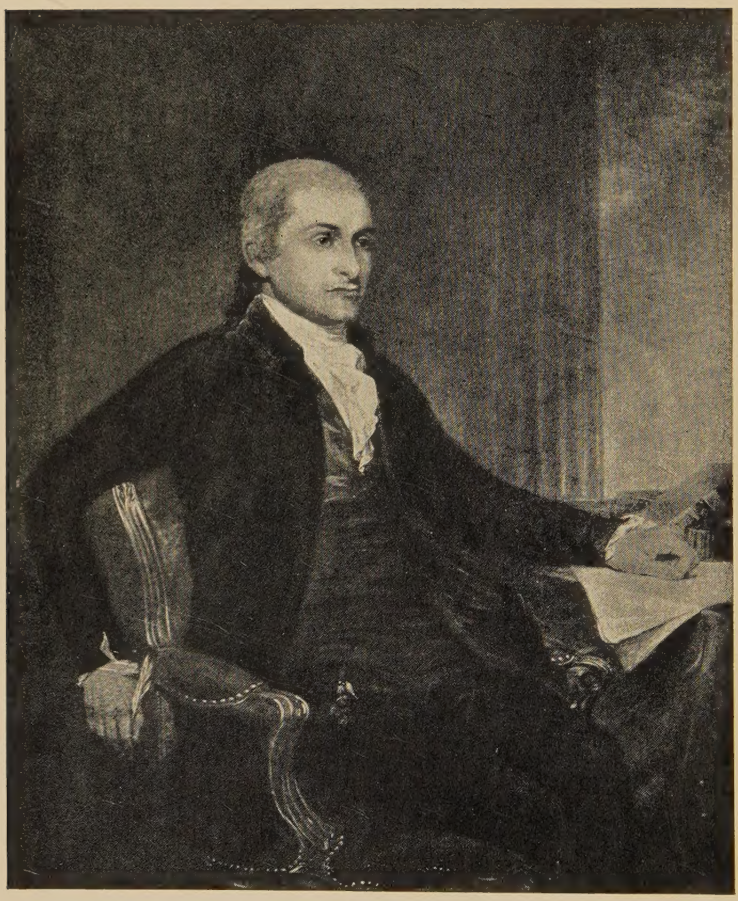
THE SUPREME COURT IN UNITED STATES HISTORY

VOLUME ONE

By Charles Warren

THE SUPREME COURT IN UNITED STATES HISTORY. New and Revised Edition. Two Volumes.

CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT.



JOHN JAY
From the portrait by Gilbert Stuart.

THE SUPREME COURT
IN
UNITED STATES HISTORY

BY

CHARLES WARREN

FORMERLY ASSISTANT ATTORNEY-GENERAL OF THE UNITED STATES
AUTHOR OF "A HISTORY OF THE AMERICAN BAR"

NEW AND REVISED EDITION

IN TWO VOLUMES

VOLUME ONE

1789-1835

BOSTON
LITTLE, BROWN, AND COMPANY
1926

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PRINTED IN THE UNITED STATES OF AMERICA

PREFACE

THIS book is not a law book. It is a narrative of a section of our National history connected with the Supreme Court, and is written for laymen and lawyers alike. As words are but "the skin of a living thought",[1] so law cases as they appear in the law reports are but the dry bones of very vital social, political and economic contests; they have lost all fleshly interest. This book is an attempt to revivify the important cases decided by the Court and to picture the Court itself from year to year in its contemporary setting.

For those who wish a recital of the decisions and a collection of the biographies of the Judges, other histories of the Court are available (such as Hampton L. Carson's, prepared at the time of the Centennial of the Federal Judiciary). For those who wish a statement of the doctrines of constitutional law established in the long line of opinions of the Court, there are numerous technical law books to supply their needs. But for those who wish to view the Court and its decided cases, as living elements and important factors in the course of the history of the United States, there are few published works, other than Gustavus Myers' *History of the United States Supreme Court* (written from a purely Socialistic standpoint), and Albert J. Beveridge's masterly *Life of John Marshall.* (The

[1] "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Holmes, J., in *Towne* v. *Eisner* (1918), 245 U. S. 418, 425.

chapters of my book covering the period described by Beveridge were completed before the publication of his work; they are written, however, from an entirely different standpoint, and without any attempt to rival his dramatic depiction of personalities.)

While the Court's history might be set forth more logically by tracing continuously the development of the doctrines established by the decided cases, I have purposely described it, Term by Term, in order that its decisions might be the better correlated, in the reader's mind, with the political events in the Nation's history. I have laid particular stress upon the views taken of the Court and of its important cases by contemporary writers and statesmen; for the impression made upon the public by the Court's decisions has often had as great an effect upon history as have the decisions themselves. At the same time, I have pointed out that contemporary appraisal of men and events is frequently mistaken, and that (as has been well said) destiny may laugh it to scorn. I have emphasized the important part which the attacks upon the Court have played; for such attacks have often affected or modified the status of the Court and of its decisions. In carrying out this plan of preserving, as far as possible, the atmosphere of the times, I have quoted with considerable fullness from articles and letters appearing in newspapers, magazines, and elsewhere.[1] While such a method of writing history tends to discursiveness and may offend some historical technicians, I have deliberately decided to run that risk.

[1] In estimating the effect of newspapers upon public opinion, the reader must bear in mind that in the eighteenth century and for the first half of the nineteenth century, the editorials and articles of the Washington papers and the editorials and Washington correspondence of the leading New York, Boston, Philadelphia, and Richmond papers, dealing with the Court and its important cases, were widely copied and reproduced in newspapers throughout the country.

I have not attempted a detailed description of the Court and of its important cases later than the close of the Chief Justiceship of Waite. The succeeding thirty years of Chief Justices Fuller and White comprise a period so recent and so clearly within the view of living men as to render such detailed treatment unnecessary. Moreover, the proper historical perspective is lacking. Accordingly, I have given but a broad general outline of the leading cases and doctrines during the years 1888 to 1918.

No one can read the history of the Court's career without marveling at its potent effect upon the political development of the Nation, and without concluding that the Nation owes most of its strength to the determination of the Judges to maintain the National supremacy. Though, from time to time, Judges have declared that the preservation of the sovereignty of the States in their proper sphere was as important as the maintenance of the rights vested in the Nation, nevertheless, the Court's actual decisions at critical periods have steadily enhanced the power of the National Government; and the result has been that, as Edward S. Corwin has recently said in his *John Marshall:* "The Court was established under the sway of the idea of the balance of power. . . . The Nation and the States were regarded as competitive forces, and a condition of tension between them was thought to be not only normal, but desirable. The modern point of view is quite different. Local differences have to a great extent disappeared, and that general interest which is the same for all the States is an ever-deepening one." It is interesting to surmise what would have been the status of the United States today, had the Judges, after appointment to the Supreme Bench, adopted or continued to hold the narrower

views of National authority and the broader views of the sovereignty of the individual States, which were undoubtedly held by most of the framers of the Constitution. To untrammeled intercourse between its parts, the American Union owes its preservation and its strength. Two factors have made such intercourse possible — the railroad, physically; the Supreme Court, legally.[1]

In order to emphasize the subject-matter of this work, I have intentionally (and despite some modern purists in typography) used capital letters, in connection with the words "Court", "Bench" (when synonymous with Court), "Judge", "Judiciary", "Bar", "State-Rights" and "Nation", both in the quoted as well as in the original matter.[2] For conciseness, in referring to members of the Court, I have intentionally used the word "Judge", instead of the more technically accurate "Associate Justice."

As much new material has been gathered from unpublished MSS., I desire to acknowledge gratefully the courteous assistance which I have received from library officials, in connection with my use of the following MSS. collections: papers of George Washington, John Breckenridge, Harry Innes, John Marshall, Thomas Jefferson, James Madison, James A. Bayard, James Monroe, Cæsar A. Rodney, Joseph H. Nicholson, William Wirt, Smith Thompson, James

[1] "If the system of internal improvements could go on for a few years with vigor . . . this Union would be bound by ties stronger than all the Constitutions that human wisdom could devise. A railroad from New England to Georgia would do more to harmonize the feelings of the whole country, than any amendments that can be offered or adopted to the Constitution. It is intercourse we want." So wrote Abbott Lawrence of Boston to Henry Clay, March 26, 1833. *Works of Henry Clay* (1855), IV.

[2] As the statesmen, letter writers and newspapers, from 1789 through the first quarter of the nineteenth century, used capital letters according to the whim of the moment, and with no apparent logical system, I have preferred to preserve a uniformity of typography rather than an exact reproduction of their whims.

Kent, John J. Crittenden, Martin Van Buren, Andrew Jackson, John McLean, John M. Clayton, Daniel Webster, Gideon Granger, Francis Granger, Thurlow Weed, Benjamin R. Curtis, and Franklin Pierce (in the Library of Congress); James Wilson, Richard Peters, and John Sergeant (in the Library of the Historical Society of Pennsylvania); papers of Joseph Story and Timothy Pickering (in the Massachusetts Historical Society); papers of William Paterson (George Bancroft copies) (in the New York Public Library); and papers of Charles Sumner (in the Harvard College Library).

I cannot expect entire freedom from mistakes in a book containing such a mass of detail and citation; but I indulge in the hope that the reader, overlooking errors which "like straws upon the surface float", will emerge from the depths, bringing with him a new and enlarged conception of the Supreme Court's place in American history.

CHARLES WARREN.

WASHINGTON, D. C.,
March, 1922.

This new edition has enabled me to make certain corrections and additions in the text; to supply further illustrative notes at the end of many chapters; and to amplify the appendix.

Those laymen and lawyers who may gain, from this book, a new conception of the part which the Court has played in relation to the American Government and to American history will find it supplemented by the description of the relation of the Court to Congress contained in my later book, "Congress, the Constitution, and the Supreme Court."

CHARLES WARREN.

WASHINGTON, D. C.,
June, 1926.

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ABBREVIATIONS OF TITLES OF BOOKS FREQUENTLY CITED

[For the purpose of conciseness in the citation of books most frequently quoted, the following abbreviations have been used in the notes.]

J. Q. Adams, Memoirs of John Quincy Adams (1874–1877), edited by Charles Francis Adams, 12 vols.

J. Q. Adams' Writings, The Writings of John Quincy Adams (1913–1915), edited by Worthington Chauncey Ford, 7 vols.

Clay, The Works of Henry Clay (1904), edited by Calvin Colton, Federal edition, 10 vols.

Curtis, The Life and Writings of Benjamin Robbins Curtis, LL.D. (1879), edited by Benjamin R. Curtis, 2 vols.

Hamilton, The Works of Alexander Hamilton (1904), edited by Henry Cabot Lodge, 12 vols.

Hamilton (Lodge's ed.), *The Works of Alexander Hamilton* (1885–1886), edited by Henry Cabot Lodge, 9 vols.

Hamilton (J. C. Hamilton's ed.), *The Works of Alexander Hamilton* (1850–1851), edited by John Church Hamilton, 7 vols.

Iredell, Life and Correspondence of James Iredell (1858), edited by Griffith John McRee, 2 vols.

Jay, The Correspondence and Public Papers of John Jay (1890–1893), edited by Henry Phelps Johnston, 4 vols.

Jefferson, The Works of Thomas Jefferson (1904–1908), edited by Paul Leicester Ford, 12 vols.

Jefferson (A. C. Lipscomb ed.), *The Writings of Thomas Jefferson* (1903–1904), edited by Andrew C. Lipscomb, 20 vols.

Jefferson (H. A. Washington ed.), *The Writings of Thomas Jefferson* (1853–1854), edited by Henry Augustine Washington, 9 vols.

King, The Life and Correspondence of Rufus King (1894–1900), edited by Charles Ray King, 6 vols.

Madison, The Writings of James Madison (1906–1910), edited by Gaillard Hunt, 9 vols.

Madison (1865), *Letters and Other Writings of James Madison* (1865), published by order of Congress, 4 vols.

Marshall, Life of John Marshall (1916–1919), by Albert Jeremiah Beveridge, 4 vols.

Mason, Memoir and Correspondence of Jeremiah Mason (1873) edited by George S. Hillard.

Monroe, The Writings of James Monroe (1898–1903), edited by Stanislaus Murray Hamilton, 7 vols.

Story, Life and Letters of Joseph Story (1851), by William Waldo Story, 2 vols.

Sumner, Memoir and Letters of Charles Sumner (1877–1893), by Edward Lillie Pierce, 4 vols.

Taney, Memoir of Roger Brooke Taney (1872), by Samuel Tyler.

Ticknor, Life, Letters and Journals of George Ticknor (1876), 2 vols.

Washington, Writings of George Washington (1834–1837), edited by Jared Sparks, 11 vols.

Washington (Ford's ed.), *Writings of George Washington* (1886–1893), edited by Worthington Chauncey Ford, 14 vols.

Webster, The Writings and Speeches of Daniel Webster (1903), 18 vols.

Wirt, Memoirs of the Life of William Wirt (1849), by John Pendleton Kennedy, 2 vols.

THE SUPREME COURT
IN UNITED STATES HISTORY

THE SUPREME COURT IN UNITED STATES HISTORY

VOLUME ONE

INTRODUCTORY CHAPTER

THE history of the United States has been written not merely in the halls of Congress, in the Executive offices and on the battlefields, but to a great extent in the chambers of the Supreme Court of the United States. "In the largest proportion of causes submitted to its judgment, every decision becomes a page of history." [1] "In not one serious study of American political life," said Theodore Roosevelt at a dinner of the Bar in honor of Judge Harlan in 1902, "will it be possible to omit the immense part played by the Supreme Court in the creation, not merely the modification, of the great policies, through and by means of which the country has moved on to her present position. . . . The Judges of the Supreme Court of the land must be not only great jurists, they must be great constructive statesmen, and the truth of what I say is illustrated by

[1] Attorney-General George W. Wickersham, in his address before the Bar of the Court, on the death of Chief Justice Fuller, 219 U. S. xv. Henry Adams' statement in his *History of the United States* (1890), IV, 265, that "history has nothing to do with law except to record the development of legal principles", is singularly inept, for the law as enounced by the Court has made much of the history of the country. See also *Historical Lights from Judicial Decisions*, by Edward Cahill, *Michigan Law Review* (1908), VI.

every study of American statesmanship." The vitally important part, however, which that Court has played in the history of the country in preserving the Union, in maintaining National supremacy within the limits of the Constitution, in upholding the doctrines of international law and the sanctity of treaties, and in affecting the trend of the economic, social and political development of the United States, cannot be understood by a mere study of its decisions, as reported in the law books. The Court is not an organism dissociated from the conditions and history of the times in which it exists. It does not formulate and deliver its opinions in a legal vacuum. Its Judges are not abstract and impersonal oracles, but are men whose views are necessarily, though by no conscious intent, affected by inheritance, education and environment and by the impact of history past and present; and as Judge Holmes has said: "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which Judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." [1]

Appointments to the Court, moreover, have not been made from a cloister of juridical pedants, but from the mass of lawyers and Judges taking active parts in the life of the country.[2] Presidents, in selecting Judges, have been necessarily affected by geographical and political considerations, since it has been desirable that the Court should be representative (so far as practicable) of the different sections of the country and of the leading political parties. The Senate, in rejecting for partisan

[1] *The Common Law* (1881), by Oliver Wendell Holmes, Jr.

[2] "While an 'overspeaking Judge is no well-tuned cymbal', neither is an amorphous dummy, unspotted by human emotions, a becoming receptacle for judicial power." McReynolds, J. (diss.), in *Berger* v. *United States* (1921), 255 U. S. 43.

reasons nominees of eminent legal ability, has more than once influenced the course of history. The character and capacity of counsel taking part in cases have been elements which require consideration, since the arguments of great jurists and great statesmen command an attention and afford an assistance to the Court which may powerfully affect the trend of the law.[1] The reaction of the people to judicially declared law has been an especially important factor in the development of the country; for while the Judges' decision makes law, it is often the people's view of the decision which makes history. Hence, the effect produced upon contemporary public opinion has frequently been of more consequence than the actual decision itself; and in estimating this effect, regard must be paid to the fact that, while the law comes to lawyers through the official reports of judicial decisions, it reaches the people of the country filtered through the medium of the news-columns and editorials of partisan newspapers and often exaggerated, distorted and colored by political comment. Finally, it is to be noted that Congress, in its legislation enacted as a result of judicial decisions, has always played a significant part in relation to the Court. For all these reasons, the true history of the Court must be written not merely from its reported decisions but from the contemporary newspapers, letters, biographies and Congressional debates which reveal its relations to the people, to the States and to Congress, and the reactions of those bodies to

[1] In *Sauer* v. *New York* (1907), 206 U. S. 536, McKenna, J. (diss.), said: "The elevated railroad cases get significance from the argument of counsel. Such arguments, of course, are not necessarily a test of the decision, but they may be. The opinion may respond accurately to them." In *Bridge Proprietors* v. *Hoboken etc. Co.* (1864), 1 Wall. 516, Miller, J., spoke of a case as one "argued at much length by Mr. Webster, Mr. Sergeant and Mr. Clayton whose names are a sufficient guarantee that the matter was well considered." See also comments on the value of arguments by able counsel in *Woods* v. *Lawrence Co.* (1862), 1 Black, 386.

its decisions. Recourse to such evidence of contemporary opinion and criticism of the Court is especially necessary for an understanding of the degree to which opposition to the Court and popular counter-movements have affected the history of the country at different periods. Of the great political revolution of 1800 which destroyed the Federalist Party, the public attitude towards the National Judiciary was no small cause. In bringing about the rise of Jacksonian Democracy, the antagonism caused in many States by John Marshall's decisions was a potent factor. The attitude of the Court on questions arising out of the slavery issue was closely connected with the outbreak of the Civil War. The violent Republican onslaught on the Court for its courageous and notable opinions at the end of the War reacted on the whole unfortunate course of Reconstruction. Nothing in the Court's history is more striking than the fact that, while its significant and necessary place in the Federal form of Government has always been recognized by thoughtful and patriotic men, nevertheless, no branch of the Government and no institution under the Constitution has sustained more continuous attack or reached its present position after more vigorous opposition. It was, however, inevitable from the outset that the Court's powers, its jurisdiction and its decisions should be the subject of constant challenge by one political party or the other; for a tribunal whose chief duty was that of determining between conflicting jurisdictions in a Federal form of Government could not hope to escape criticism, invective, opposition and even resistance.[1] One interest-

[1] See *Centralization and the Law* (1908), by Melville M. Bigelow, 55; William Tudor wrote in 1816 in *North Amer. Rev.*, III, 102: "Whenever any set of men shall entertain designs against the Constitution, either to overwhelm it in the anarchy of simple democracy, or to found on its ruins a usurpation of monarchical power, they will commence their operations by open or insidious attacks to weaken and overthrow the Judiciary."

ing feature of the first century of its existence should be noted — that the chief conflicts arose over the Court's decisions restricting the limits of State authority and not over those restricting the limits of Congressional power. Discontent with its decisions on the latter subject arose, *not* because the Court held an Act of Congress unconstitutional, but rather because it refused to do so; the Anti-Federalists and the early Republicans assailed the Court because it failed to hold the Sedition Law, the Bank of the United States charter and the Judiciary Act unconstitutional; the Democrats later attacked the Court for enouncing doctrines which would sustain the constitutionality of an Internal Improvement bill, a voluntary Bankruptcy bill, a Protective Tariff bill and similar measures obnoxious to them; the Federalists equally attacked the Court for refusing to hold unconstitutional the Embargo Act, and the later Republicans assailed it for sustaining the Fugitive Slave Act. It was in respect to its exercise of a restraining power over the States that the Court met with its chief opposition. That the Federal Judiciary would of necessity be the focus of attack in all important controversies between the States and the Nation was fully recognized by the framers of the Constitution, but it was the essential pivot of their whole plan.[1] The success of the new Government depended on the existence of a supreme tribunal, free from local political bias or prejudice, vested with power to give an interpretation to Federal laws and treaties which should be uniform throughout the land,

[1] Rufus King wrote to Jonathan Jackson, Sept. 3, 1786: "Mr. Madison of Virginia has been here for some time past; he will attend the Convention. He does not discover or propose any other plan than that of investing Congress with full powers for the regulation of commerce foreign and domestic. But this power will run deep into the authorities of the individual States, and can never be well exercised without a Federal Judicial." *Mass. Hist. Soc. Proc.* (1915–16), XLIX.

to confine the Federal authority to its legitimate field of operation, and to control State aggression on the Federal domain.[1]

The history of the foundation of the Court in the proceedings of the Federal Convention of 1787 is too well known to need repetition. The initial step in establishing the supremacy of the new Federal Government was taken on July 17, 1787, when Luther Martin of Maryland moved the adoption of the following resolution:

> Resolved that the Legislative acts of the United States made by virtue and in pursuance of the articles of Union, and all treaties made and ratified under the authority of the United States shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their Citizens and inhabitants — and that the Judiciaries of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding.

And this, in its final form, became the second clause of Article Six of the Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[1] See *The Supreme Court of the United States, Its History and Influence on our Constitutional System* (1890), by Westel W. Willoughby; *Gordon* v. *United States* (1864), 117 U. S. App. 700–701. "The reason for giving such unusual power to a judicial tribunal is obvious. It was necessary to give it from the complex character of the Government of the United States, which is in part National and in part Federal; where two separate governments exercise certain powers of sovereignty over the same territory, each independent of the other within its appropriate sphere of action, and where there was, therefore, an absolute necessity, in order to preserve internal tranquillity, that there should be some tribunal to decide between the Government of the United States and the government of a State, whenever any controversy should arise as to their relative and respective powers in the common territory. The Supreme Court was created for that purpose."

The supremacy of the Nation in its constitutional field of operation being thus established, the next step requisite to the fulfillment of the purposes of the framers of the Constitution was the establishment of a tribunal which should have the power of enforcing throughout the Nation and in the States the supremacy of the Constitution and of the laws so asserted — an organ of Government, which should be, as Bryce has termed it, "the living voice of the Constitution." By the adoption of Sections 1 and 2 of Article III, the framers completed their work in providing that: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish"; and by enumerating the cases to which the judicial power should extend, and the scope of the original and of the appellate jurisdiction of the Supreme Court.[1] The structure of the National Judiciary being thus outlined, the Convention left to the First Congress the important tasks of settling the composition of the Supreme Court, of erecting inferior Courts, of framing modes of procedure, and — most important of all — of establishing the extent of the Supreme Court's appellate jurisdiction, both with reference to State and inferior Federal Courts. The task thus imposed upon the Congress was of a most delicate nature; for during the long contest over the adoption of the Constitution, after it left the hands of its framers, the Article relating to the Judicial branch of the new Government had been the subject of more severe criticism and of greater apprehensions than any other portion of the instrument.[2] Elbridge Gerry had complained that "there are no well-defined limits of the

[1] See *Muskrat* v. *United States* (1911), 219 U. S. 346.

[2] *History of the Supreme Court of the United States* (1891), by Hampton L. Carson, 107–119.

Judiciary powers; they seem to be left as a boundless ocean that has broken over the chart of the Supreme Lawgiver." Edmund Randolph had objected to the lack of limitation or definition of the judicial power. George Mason had said that "the Judiciary of the United States is so constructed and extended as to absorb and destroy the Judiciaries of the several States." Richard Henry Lee had inveighed at length against the powers of the Federal Judiciary. Luther Martin and Patrick Henry had expressed grave fears of the system. On the other hand, the provisions of the Constitution respecting the judicial system had been eloquently supported by Edmund Pendleton, John Marshall, John Jay, James Wilson, James Iredell, James Madison and by Alexander Hamilton, both in speeches at the State Conventions and in pamphlets written in defense of the proposed new Government.

It was with full comprehension of the difficulty of its task and of the opposition which it must overcome, that the First Congress undertook as one of its earliest tasks the completion of the judicial system; and on April 7, 1789, in the Senate, Oliver Ellsworth of Connecticut, William Paterson of New Jersey, William Maclay of Pennsylvania, Caleb Strong of Massachusetts, Richard Henry Lee of Virginia, William Few of Georgia, Richard Bassett of Delaware, Paine Wingate of New Hampshire, Charles Carroll of Maryland, and Ralph Izard of South Carolina were appointed a Committee. The Judiciary Bill was drafted largely by Ellsworth and Paterson.[1] The Chairman of the Committee, Lee, who as an Anti-Federalist

[1] For details, see *New Light on the History of the Federal Judiciary Act of 1789*, by Charles Warren, *Harv. Law Rev.* (1923), XXXVII. Paine Wingate wrote to Timothy Pickering, April 29, 1787: "Mr. Ellsworth seems to be the leading projector." *Pickering Papers MSS;* see also *Iredell*, II, letter of Lowther, July 1, 1787.

feared extension of Federal power, was at first inclined to be sanguine over the shape which the bill was taking. "In the Senate a plan is forming for establishing the Judiciary system," he wrote to Patrick Henry. "So far as this has gone, I am satisfied to see a spirit prevailing that promises to send this system out, free from those vexations and abuses that might have been warranted by the terms of the Constitution. It must never be forgotten, however, that the liberties of the people are not so safe under the gracious manner of government as by the limitation of power." [1] Another Anti-Federalist, however, William Maclay, Senator from Pennsylvania, deplored the fact that the bill "was fabricated by a knot of lawyers", and stated that: "I really fear that it will be the gunpowder-plot of the Constitution. So confused and so obscure, it will not fail to give a general alarm. . . . It certainly is a vile law system, calculated for expense and with a design to draw by degrees all law business into the Federal Courts. The Constitution is meant to swallow all the State Constitutions by degrees; and thus to swallow, by degrees, all the State Judiciaries." [2] On the other hand, the importance of the bill as a measure designed to enforce the supremacy of the Constitution was fully recognized by the supporters of that instrument. Ellsworth wrote: "I consider a proper arrangement of the Judiciary, however difficult to establish, among the best secur-

[1] *The Letters of Richard Henry Lee* (1914), ed. by James C. Ballagh, II, letter of Lee to Henry, May 28, 1789. The bill was reported by Lee, June 12, 1789; was given its second and third readings, June 22, July 7; was debated on July 8, 9, 10, 11; passed the Senate by a vote of 14 to 6 on July 17, Lee voting against it; was sent to the House, July 20, where it was debated from time to time until Sept. 17, when it passed with amendments. The bill was amended and referred in the Senate to a Committee consisting of Ellsworth, Paterson, and Pierce Butler of South Carolina; it was passed by the House again with the Senate changes, Sept. 21, and was signed by President Washington, Sept. 24, 1789.

[2] *Sketches of Debates in the First Senate of the United States* (1890), by William Maclay, entries of June 29, July 2, 7, 17, 1789.

ities the government will have, and question much if any will be found more economical, systematic and efficient than the one under consideration. Its fate in the House of Representatives, or in the opinion of the public, I cannot determine." [1] And James Monroe wrote to James Madison: "That (the bill) to embrace the Judiciary will occasion more difficulty, I apprehend, than any other, as it will form an exposition of the powers of the Government itself, and show in the opinion of those who organized it, how far it can discharge its own functions, or must depend for that purpose on the aid of those of the States. Whatever arrangement shall be now made in that respect will be of some duration, which shows the propriety of a wise provision in the commencement." [2] In the House, fears as to the Federal Judiciary as an instrument of Federal encroachment on State authority were expressed in the debates over the famous Twenty-Fifth Section which authorized writs of error to the Supreme Court on judgments of State Courts.[3] "It is much to be apprehended that this constant control of the Supreme Federal Court over the adjudication of the State Courts would dissatisfy the people and weaken the importance and authority of the State Judges,"

[1] *State Trials* (1849), by Francis Wharton, letter of Ellsworth to Judge Richard Law, Aug. 7, 1789.

[2] *Monroe*, I, letter of Aug. 12, 1789.

[3] The progress of the bill in the House was commented on in the correspondence of Fisher Ames, the talented Federalist Congressman from Massachusetts, as follows: "*July 8, 1789.* The Judiciary is before the Senate who make progress. Their committee labored upon it with vast perseverance and have taken as full a view of their subject as I ever knew a committee to take. Mr. Strong, Mr. Ellsworth and Mr. Paterson, in particular, have their full share of this merit. *Sept. 3, 1789.* You will see by the papers what pace we move in the discussion of the Judiciary bill. The question whether we shall have inferior tribunals (except admiralty courts, which were not denied to be necessary) was very formidably contested. Judge Livermore, and ten others, voted against them. You will see in *Fenno's Gazette* my speechicle on the subject. *Sept. 7, 1789.* The Judicial slumbers, and when it shall be resumed will probably pass as an experimental law, without much debate or amendment, in the confidence that a short experience will make manifest the proper alterations." *Works of Fisher Ames* (1854,) I.

said William Smith of South Carolina.[1] James Jackson of Georgia opposed the Twenty-Fifth Section. "It swallows up every shadow of a State Judiciary. . . . In my opinion, and I am convinced experience will prove it, there will not, neither can there be, any suit or action brought in any State Courts but may under this clause be reversed or affirmed by being brought within the cognizance of the Supreme Court." Fisher Ames and Theodore Sedgwick of Massachusetts, Egbert Benson of New York, and James Madison of Virginia, on the other hand, advocated the proposed system; and Roger Sherman of Connecticut closed the debate by arguing powerfully that the authority of the Federal Courts under this Section was necessary "to guard the rights of the Union against the invasion of the States. If a State Court should usurp the jurisdiction of Federal causes and by its adjudications attempt to strip the Federal Government of its constitutional rights, it is necessary that the National tribunal shall possess the power of protecting those rights from such invasion."

The Judiciary Act was finally enacted on September 24, 1789. It provided for a Supreme Court to consist of a Chief Justice and five Associate Judges; for thirteen District Courts and for three Circuit Courts each to be composed of two Supreme Court Judges sitting with a District Court Judge; it fixed the jurisdiction of the inferior Federal Courts; and it provided for appellate jurisdiction from the State Courts in certain cases presenting Federal questions.[2] With few

[1] *1st Cong., 1st Sess.*, Aug. 29, 1789.

[2] The official title of the Chief Justice seems to have varied at different periods of the Court's history. Jay was commissioned under the title of "Chief Justice of the Supreme Court of the United States", as were Rutledge, Ellsworth, Marshall, Taney, Chase and Waite. Fuller was commissioned as "Chief Justice of the United States." The Constitution mentions the office of Chief Justice only once; in Article One, Section three, relative to impeachments in which it is pro-

essential changes, this great piece of legislation has remained the law of the country to the present day. "The wisdom and forethought with which it was drawn, have been the admiration of succeeding generations," said a Judge of the Supreme Court in 1911. "This was probably the most important and the most satisfactory Act ever passed by Congress."[1] That this commendation was justified is unquestionable. Nevertheless, in considering the effect of the Act upon the history of the Court, attention must be paid to the fact that it received severe criticism from many contemporary lawyers and statesmen. Within a year after its enactment, Attorney-General Edmund Randolph made a lengthy report to the President, urging radical and extensive amendments. The early Judges of the Supreme Court constantly advocated important changes, especially in the provisions of the Act relating to Circuit Court duty.[2] William Grayson of Virginia wrote to Patrick Henry, immediately after the passage of the Act: "The Judicial Bill has passed, but wears so monstrous an appearance that I think it

vided — "When the President of the United States is tried, the Chief Justice shall preside." The Judiciary Act of Sept. 24, 1789, provided that the Supreme Court "shall consist of a chief justice and five associate justices." The Act of July 13, 1866, c. 210, for the first time officially used the term "Chief Justice of the United States" providing that "thereafter the Supreme Court shall consist of a Chief Justice of the United States and six associate justices." The Act of April 10, 1869, c. 22, provided that the Court shall "hereafter consist of the Chief Justice of the United States and eight associate justices." The Revised Statutes, Section 673, and the Act of March 3, 1911, c. 231, codifying the laws relating to the judiciary, Section 215, refer to "a Chief Justice of the United States." On the other hand, the statutes relating to the salaries of the Court, viz.: the Act of March 3, 1873, c. 226, the Act of Feb. 12, 1902, c. 547, and the Act of March 3, 1911, c. 231, Section 218, all refer to "the Chief Justice of the Supreme Court of the United States." *New England Historical and Genealogical Register* (1895), XLIX, 275.

[1] Address of Mr. Justice Brown before the American Bar Association, August 20, 1911. As to the history and scope of this Act, see *Virginia* v. *Rives* (1880), 100 U. S. 313, 338; *Tennessee* v. *Davis* (1880), 100 U. S. 257, especially dissenting opinion of Clifford, J.; *United States* v. *Holliday* (1866), 3 Wall. 417. See also *Genesis of the Federal Judiciary System*, by W. B. Richards, *Virg. State Bar Assn.* (1904), XVII.

[2] See *infra*, 86–90.

will be *felo-de-se* in the execution. . . . Whenever the Federal Judiciary comes into operation, I think the pride of the States will take alarm which, added to the difficulty of attendance from the extent of the district in many cases, the ridiculous situation of the venue, and a thousand and other circumstances, will in the end procure its destruction. The salaries, I think, are rather high for the temper or circumstances of the Union and furnish another cause of discontent to those who are dissatisfied with the Government." [1] At the same time, John Brown, a Congressman from Kentucky, wrote: "I fear in the administration of it great difficulties will arise from the concurrent jurisdictions of the Federal with the State Courts which will unavoidably occasion great embarrassment and clashing. But it is absolutely necessary to pass a Judiciary Law at this session, and the one which passes is as good, I believe, as we at present could make it. Experience may point out its defects." Another Congressman writing from New York, September 14, said: "The Judicial Bill is now under consideration by Congress. This Department, I dread as an awful Tribunal . . . by its institution, the Judges are completely independent, being secure of their salaries, and removable only by impeachment, not being subject to discharge on address of both Houses as is the case in Great Britain." [2] And William R. Davie, the leader of the Bar in North Carolina, wrote to Judge Iredell, August 2, 1791: "I sincerely hope something will be done at the next session of Congress with the Judiciary Act; it is so defective in point of arrangement, and so obscurely drawn or expressed, that, in my opinion, it would

[1] *Letters and Times of the Tylers* (1884), by Lyon G. Tyler, letter of Sept. 29, 1789; *Harry Innes Papers MSS*, letter to Harry Innes, Sept. 28, 1789.

[2] See *Oracle of the Day* (Portsmouth, N. H.), quoted in *General Advertiser* (Phil.), June 9, 1795.

disgrace the composition of the meanest Legislature of the States."

Later attacks upon the Federal judicial system have been largely attributable to the fact that neither of the two great powers which the Supreme Court has exercised in interpreting and maintaining the supremacy of the Constitution were granted in express terms in the instrument itself. For the power to pass upon the constitutional validity of State legislation was conferred by Congress by this Twenty-Fifth Section of the Judiciary Act, in pursuance of the general power of Congress to pass all acts "necessary and proper for carrying into execution . . . all other powers vested by this Constitution in the Government of the United States", and in order to make effective the provision of Article Six, to the end that the Constitution and the Laws of the United States should be the supreme law of the land. And the Court's power to pass on the constitutional validity of Federal legislation was established by decisions of the Court itself, as an inherent and necessary judicial function in ascertaining and interpreting what the finally binding law was.[1] Yet as Madison said in 1832, a supremacy of the Constitution and laws of the Union " without a supremacy in the exposition and execution of them would be as much a mockery as a scabbard put into the hands of a soldier without a sword in it. I have never been able to see that, without such a view of the subject, the Constitution itself could be the supreme law of the land; or

[1] Edward S. Corwin in his illuminating book on *The Doctrine of Judicial Review* (1914), 17, takes this position that the power was not to be implied from the provisions of either Article III or Article VI of the Constitution, but was "the natural outgrowth of ideas that were common property in the period when the Constitution was framed. . . . We are driven to the conclusion that judicial review was rested by the framers of the Constitution upon certain general principles which in their estimation made specific provision for it unnecessary, in the same way as, for example, certain other general principles made unnecessary specific provision for the President's power of removal."

that the uniformity of the Federal authority throughout the parties to it could be preserved; or that, without this uniformity, anarchy and disunion could be prevented." The possession of these powers by the Court, moreover, is vital to the preservation not merely of our form of Government, but of the rights and liberties of the individual citizen. "Its exercise," said Judge Field at the Centennial Celebration of the Court, "is necessary to keep the administration of the Government, both of the United States and of the States in all their branches, within the limits assigned to them by the Constitution of the United States and thus secure justice to the people against the unrestrained legislative will of either — the reign of law against the sway of arbitrary power." [1] In any community, the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property and his liberty constitute one of the most certain tests of the character and value of the government; and the chief safeguard of the individual's right is to be found in the existence of a Judiciary vested with authority to maintain the supremacy of law above the possession and exercise of governmental power. If the result of an infringement of a written Constitution by the Legislature is to be avoided, "there must be a tribunal to which an immediate appeal for redress can be made by any person who is damnified by the action

[1] John C. Calhoun in the Nullification debate in 1833 said that the power of the Court "had its origin in the necessity of the case. Where there were two or more rules established, one from a higher, and the other from a lower authority, which might come into conflict in applying them to a particular case, the Judge could not avoid pronouncing in favor of the superior against the inferior. It was from this necessity, and this alone, that the power which is now set up to overrule the rights of the States, against an express provision of the Constitution, was derived. It had no other origin. That he had traced it to its true source would be manifest from the fact that it was a power which, so far from being conferred exclusively on the Supreme Court, as was insisted, belonged to every Court, inferior and superior, State and general." *22d Cong., 2d Sess.*, Feb. 15, 1833.

of the Legislature; and the tribunal which affords redress in such case necessarily exercises judicial power, because it declares what is, and what is not, law, and applies what it declares to be law to the facts submitted to its investigation." [1]

Of the two powers vested in the Court for the enforcement of the supremacy of the Constitution, it may be admitted that its power to pass upon the constitutionality of Congressional legislation was, from the standpoint of the existence of the Nation, of lesser necessity. From 1789 to 1924, forty-nine Acts of Congress were held void; but while the mere existence of the Court's power undoubtedly acted as a legislative deterrent, nevertheless, had the Court not possessed or exercised it, the United States might still have functioned as a Nation.[2] But it must also be noted that, without such power vested in the Court, and with no check on Congress, the Nation could never have remained a Federal Republic. Its government would have become a consolidated and centralized autocracy. Congress would have attained supreme, final and unlimited power over the Executive and the Judiciary branches, and the States and the individual citizens would have possessed only such powers and rights as Congress chose to leave or grant to them. The hard-fought-for Bill of Rights and the reserved powers of the States guaranteed by the Constitution would have become unenforceable. The lives, liberties and properties of the minority would have been subject to the unlimited control of the prejudice, whim or passion of the majority as represented in Congress at any given

[1] *The Supremacy of the Judiciary*, by A. Inglis Clark, *Harv. Law Rev.* (1903) XVII.

[2] From 1789 to the end of the October Term of 1923, the Court rendered fifty-three decisions holding Acts of Congress unconstitutional in whole or in part; but of these decisions not over eleven have ever received any serious criticism. See *Congress, the Constitution, and the Supreme Court* (1925) by Charles Warren.

moment. Though such a government might possibly have operated in this country, it would not have been the form of government which the framers of the Constitution intended, but a government with unlimited powers over the States.[1] Nevertheless, as Judge Holmes has said, "the United States would not come to an end if we lost our power to declare an Act of Congress void."[2] On the other hand, it is unquestionably true that the existence of the United States as a nation would have been endangered, had the Court possessed no power of determining whether State statutes conflicted with the Federal Constitution. "I do think the Union would be imperilled," said Judge Holmes, "if we could not make that declaration as to the laws of the several States. For one in my place sees how often a local policy prevails with those who are not trained to National views, and how often action is taken that embodies what the Commerce Clause was meant to end." "The power given to the Supreme Court by this (Judiciary) Act," said Chief Justice Taney, "was intended to protect the General Government in the free and uninterrupted exercise of the powers conferred on it by the Constitution, and to prevent any serious impediment from being thrown in its way while acting within

[1] See *The Fundamental Law and the Power of the Courts*, by Herbert Pope, *Harv. Law Rev.* (1913), XXVII.

[2] Address of Judge Oliver Wendell Holmes before the Harvard Law School Association on Law and the Court, Feb. 15, 1913. *Speeches of Oliver Wendell Holmes* (1913). It has been sometimes remarked that the existence of the judicial power has unquestionably tended to cause Congress to evade its own responsibility, and to enact statutes the constitutional validity of which it doubted, relying on the Court to hold them invalid. "There is every reason to think that Legislatures have passed bills, knowing them to be unconstitutional, in order to place the onus of declaring them so on the Courts." *Property and Contract in Their Relations to Distribution of Wealth* (1918), by Richard T. Ely: *The New York Employers Liability Act*, by Judge A. A. Bruce, *Michigan Law Rev.* (1911), IX. In *Evans* v. *Gore* (1920), 253 U. S. 245, 248, the Court said: "Moreover, it appears that, when this taxing provision was adopted, Congress regarded it as of uncertain constitutionality and both contemplated and intended that the question should be settled by us in a case like this."

the sphere of its legitimate authority."[1] Its great purpose was to avoid conflict of decision between State and Federal authorities, to secure to every litigant whose rights depended on Federal law a decision by the Federal Courts, and to prevent the Courts of the several States from impairing the authority of the Federal Government; and had the Court not been vested with this power, it may well be doubted whether the National Union could have been preserved. It was not without reason that John C. Calhoun deemed this Section "the entering wedge", destroying, as he believed, "the relation of co-equals and co-ordinates between the Federal Government and the Governments of the individual States. . . . The effect of this," he said, "is to make the Government of the United States the sole judge, in the last resort, as to the extent of its powers. . . . It is the great enforcing power to compel a State to submit to all acts. . . . Without it, the whole course of the Government would have been different — the conflict between the co-ordinate Governments, in reference to the extent of their respective powers, would have been subject only to the action of the amending power, and thereby the equilibrium of the system been preserved, and the practice of the Government made to conform to its Federal character."[2] That Calhoun rightly attributed to the operation of this Section the development of the Government on the National rather than on the Federal theory and into a Nation rather than into a Confederacy must be acknowledged by all who read the opinion of Chief Justice Marshall in *Cohens* v. *Virginia* — that opinion which has been

[1] *Commercial Bank of Kentucky* v. *Griffith* (1840), 14 Pet. 58; *Missouri* v. *Andriano* (1891), 138 U. S. 497; *Virginia* v. *Rives* (1880), 100 U. S. 338; *Murdock* v. *Memphis* (1875), 20 Wall. 590.

[2] *Disquisition on the Constitution and Government of the United States* (1851), by John C. Calhoun, 317–340.

termed "one of the strongest and most enduring strands of that mighty cable woven by him to hold the American people together as a united and imperishable nation." [1]

Moreover, it has been through the exercise of this power to pass upon the validity of State statutes, under the Judiciary Act, that the Court has largely controlled and directed the course of the economic and social development of the United States. It is difficult to imagine what the history of the country would have been if there had been no *Dartmouth College Case* on the security of corporate charters; no *McCulloch* v. *Maryland* on the right of a State to tax a National agency; no *Gibbons* v. *Ogden* on interstate commerce; no *Brown* v. *Maryland* or *Passenger Cases* on foreign commerce; no *Craig* v. *Missouri* on State bills of credit; no *Charles River Bridge Case* on State powers over corporations; no *Slaughterhouse Cases* on the scope of the Fourteenth Amendment. If it should be answered that, even if this Section did not exist, the question of the validity of a State statute might in some cases have arisen and been determined in suits in the Circuit Courts of the United States, and might have thus reached the Supreme Court from the inferior Federal Courts, this may be admitted; and yet it would have been a slender reed on which to rest the enforcement of the supremacy of the Constitution over conflicting State legislation.[2]

But while it may be truly said that to the existence

[1] *Marshall*, IV, 343.

[2] In the first place, suits in the Federal Circuit Courts during the first seventy-six years of our judicial history (until 1866) were practically confined to cases based on diverse citizenship, so that the possibility of testing a State law would depend on its affecting a citizen of another State; in the second place, nothing could prevent a State from disregarding a judgment of the Supreme Court rendered in such a suit, or nullifying it by the simple device of making it a penal offense for a person to conform to the judgment of the Federal Court rather than to the provisions of the State law, and the validity of a conviction in a State Court under such a criminal statute could not have been tested in the Supreme Court.

of the Twenty-Fifth Section of the Judiciary Act may be assigned the chief part of the influence which the Court has had upon the law and the development of the United States, it must be noted as one of the most significant features in the Court's history that the exercise of its powers under this Section has been the chief cause of attack upon the Court itself and upon its decisions.

That the Court should have succeeded in maintaining itself in the confidence and respect of the people in the face of such constant assault is a remarkable tribute to its ability, integrity, independence, and impartiality, and a sign of popular belief in its possession of those qualities. For as an eminent State Judge has well said: "Judicial decisions upon the rights, powers, and attributes of the General and State Government, wherever the Constitution is silent, will often form a topic of much feeling and interest to the people, and of great moment to the Union. So much so, that it has occurred to my mind, as a peculiar and unanswerable reason, arising out of our system of government, why the American Judiciaries both State and Federal, even more than any other judicial tribunals on earth, should be so constituted as to stand independent of temporary excitement and unswayed by pride, popular opinion or party spirit." [1] Fully conscious of this necessity, the Court has time and time again set its face firmly against the appeal of popular passions and prejudices, and the temporary cries of the momentary majority. "The Judiciary of the United States — independent of party, independent of power, and independent of popularity" was a toast given at a dinner in Washington in 1801; these words have expressed the aim, and substantially the achievement,

[1] Richardson, J., in *City Council* v. *Weston* (1824), 1 Harper (So. Car.) 340.

of the Court, in the one hundred and twenty years which have since elapsed.[1] "It is not for Judges to listen to the voice of persuasive eloquence or popular appeal," said Judge Story in the *Dartmouth College Case*. "We have nothing to do but pronounce the law as we find it, and having done this, our justification must be left to the impartial judgment of our country."[2] Loose statements by some modern writers on law and sociology to the effect that the "Bench has always had an avowed partisan bias", are not sustained on examination of its history.[3] Thus, Judges appointed by Jefferson and Madison did not hesitate to join with Marshall in sustaining and developing the strongly Nationalistic interpretation of the Constitution so obnoxious to Jefferson. Judges appointed by Jackson joined with Marshall and Story

[1] *Connecticut Courant*, Feb. 9, 16, 1801, account of a dinner to Oliver Wolcott in Washington, Jan. 24, 1801.

[2] Paterson, J., in *Fowler* v. *Lindsay* (1799), 3 Dallas, 411: "No prejudice or passion, whether of a State or personal nature, should insinuate itself in the administration of justice. . . . It is the duty of Judges to declare, and not to make, the law." Moody, J., in *Twining* v. *New Jersey* (1908), 211 U. S. 106: "Under the guise of interpreting the Constitution, we must take care that we do not import into the discussion our personal views of what would be wise, just and fitting rules of government to be adopted by a free people, and confound them with constitutional limitations."

[3] Brooks Adams in *The Theory of Social Revolutions* (1913), 47, says: "In fine, from the outset, the American bench, because it deals with the most fiercely contested of political issues, has been an instrument necessary to political success. Consequently, political parties have striven to control it, and therefore the bench has always had an avowed partisan bias." See in answer to this, *Judicial Interpretation of Political Theory; A Study in the Relation of Courts to the American Party System* (1914), by William B. Bizzell; *Is Law the Expression of Class Selfishness*, by Francis M. Burdick, *Harv. Law Rev.* (1912), XXV; see also *Politics and the Supreme Court*, by Walter D. Coles, *Amer. Law Rev.* (1893), XXVII. Westel W. Willoughby, *op. cit.*, 99, answering Von Holst's charge in his *Constitutional History of the United States* that their views on slavery controlled the appointment of Judges prior to 1860, says: "That the judiciary committee (of the Senate) was, for some years, influenced in its action regarding nominations to the Supreme Court by the views of the nominees as to slavery is extremely probable. . . . That, however, the Justices acted in accordance with their conscientious interpretation of the Constitution, a study of the character of the Justices, of the history of the cases, and of the several decisions rendered must, I think, convince the impartial."

in supporting the Cherokee Missionaries against Georgia, in flat opposition to Jackson. The whole Bench appointed by Jackson decided against his policy in relation to the Spanish land claims. Judges appointed by Jackson and Van Buren threw down the gauntlet to the former by issuing a mandamus against his favorite Postmaster-General. In every case involving slavery, anti-slavery Judges joined with pro-slavery Judges in rendering the decisions. The constitutionality of the obnoxious Fugitive Slave Law was unanimously upheld by anti-slavery Whig Judges and by pro-slavery Democrats alike. A Southern Democrat joined with a Northern Whig Judge in upholding laws against slave sales. President Lincoln's Legal Tender policy was held unconstitutional by his own appointees. The Reconstruction policies and acts of the Republican Party were held unconstitutional by a Republican Bench. The constitutional views of the Democratic Party as to our insular possessions were opposed by a Democratic Judge who joined with his Republican Associates in making up the majority in the *Insular Cases.* Multiple other illustrations might be cited. In fact, nothing is more striking in the history of the Court than the manner in which the hopes of those who expected a Judge to follow the political views of the President appointing him have been disappointed. While at various periods of extraordinary partisan passion, charges of political motives have been leveled at the Court, it has been generally recognized, when the storms subsided, that the accusations were unwarranted. In fact, it is one of the safeguards of our form of government that the people recognize that the refusal by the Courts to make concessions to expediency or temporary outcry is required for the protection of the rights

of the citizen. "Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the Courts," said Alexander Hamilton, "as no man can be sure that he may not be tomorrow the victim of a spirit of injustice by which he may profit today." [1]

Popular confidence in the strength and integrity of the Court has been further heightened by widespread knowledge of the fact that at all times the Court has received the aid, the support and the criticism of a Bar of the highest ability comprising lawyers from every section of the country; and the fact that, for the first seventy years, the Federal Bar was largely composed of Senators and Representatives served to keep the representatives of the people in intimate touch with the proceedings and decisions of the Court. "Upon the lawyer equally with the Judges rests the responsibility for an intelligent determination of causes in the Courts, whether relating to public or to private rights," said Judge Harlan at the Centennial of the Court. "It has been said of some judgments of the Supreme Court of the United States that they are not excelled by any ever delivered in the judicial tribunals of any country. Candor, however, requires the concession that their preparation was preceded by arguments at its Bar, of which may be said, what Mr. Justice Buller observed of certain judgments of Lord Mansfield, that they were of such transcendent power that those who heard them were lost in admiration 'at the strength and stretch of the human understanding.'"

One further factor which has strengthened the Court in popular confidence and which has greatly served to lessen the chances of friction between the component parts of the Federal system of govern-

[1] *The Federalist*, No. 78.

ment has been the voluntary limitation upon the exercise of its own power which the Court has adopted as a rule of practice. This limitation which, as a recent Judge has said, "is more than a canon of interpretation, it is a rule of conduct resting upon considerations of public policy", was first set forth by Judge Iredell in 1798, when he stated that, as the authority to declare a statute void "is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case." [1] This rule, it is to be noted, was first applied only to State statutes, as a means of avoiding friction between the States and the Federal Government. "It is but a decent respect due to the wisdom, the integrity and the patriotism of the Legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt," said Judge Washington in 1827, and Judge Woodbury said in 1848: "It is to be recollected that our Legislatures stand in a position demanding often the most favorable construction for their motives in passing laws,

[1] Moody, J., in *Employers' Liability Cases* (1908), 207 U. S. 463, 509. James Iredell even before he became a Judge of the Court had written, as early as Aug. 26, 1787, to Richard D. Spaight stating that: "In all doubtful cases to be sure, the Act ought to be supported. It should be unconstitutional beyond dispute before it is pronounced such." Iredell, J., in *Calder* v. *Bull* (1798), 3 Dallas, 386, 399; Paterson, J., in *Cooper* v. *Telfair* (1800), 4 Dallas, 14, 19; Marshall, C. J., in *Fletcher* v. *Peck* (1810), 6 Cranch, 87, 128; and *Dartmouth College* v. *Woodward* (1819), 4 Wheat. 518, 625; Washington, J., in *Ogden* v. *Saunders* (1827), 12 Wheat. 213, 270; Woodbury, J., in *Planters Bank* v. *Sharp* (1848), 6 How. 301. "Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown beyond a rational doubt." Strong, J., in *Legal Tender Cases* (1871), 12 Wall. 457, 521; Waite, C. J., in *Sinking Fund Cases* (1879), 99 U. S. 700, 718. See also Peckham, J., in *Nicol* v. *Ames* (1899), 173 U. S. 509, 515; Day, J., in *El Paso, etc. Ry.* v. *Gutierez* (1909), 215 U. S. 87, 96. Other Judges have used similar phrases to express the Court's rule of conduct. "As the State tribunals are presumed to do their duty, we should not disturb their decision, even on matters connected with the General Government, unless very manifestly improper or erroneous." Woodbury, J., in *Doe* v. *Eslava* (1850), 9 How. 421, 444. The incompatibility "must be clear and strong." Harlan, J., in *Interstate Commerce Commission* v. *Brimson* (1894), 154 U. S. 447; Brewer, J., in *Fairbank* v. *United States* (1901), 181 U. S. 283, 285.

and they require a fair rather than hypercritical view of well-intended provisions in them. Those public bodies must be presumed to act from public considerations, being in a high public trust; and when their measures relate to matters of general interest, and can be vindicated under express or justly implied powers, and more especially when they appear intended for improvements, made in the true spirit of the age, or for salutary reforms in abuses, the disposition in the Judiciary should be strong to uphold them." It was not until the year 1871 that this rule was applied in a case involving an Act of Congress, when in the *Legal Tender Cases*, Judge Strong stated that "a decent respect for a coördinate branch of the Government demands that the Judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress — all the members of which act under the obligation of an oath of fidelity to the Constitution. Such has always been the rule." In 1878, Chief Justice Waite stated that "the safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Finally, the Court's retention of popular support has been strengthened by the scrupulous care with which it has refrained from assuming any authority to decide the policy or impolicy of legislation. "No instance is afforded from the foundation of the government," said Judge White in 1904, "where an act which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that, in our constitutional system, the Judiciary was not only charged with the duty of upholding the Constitution, but also

with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the Legislative, Judicial and Executive departments of the Government, upon which our system is founded, and would be a mere act of judicial usurpation. . . . The decisions of this Court from the beginning lend no support whatever to the assumption that the Judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." "If it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon the Courts," said Judge Harlan. "No evils arising from such legislation could be more far-reaching than those that might come to our system of government, if the Judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and, upon grounds merely of justice or reason or wisdom, annul statutes that had received the sanction of the people's representatives." [1]

While, as thus outlined, the Court has won the general confidence of the people, it may fairly be admitted that criticism has not been entirely dissipated, and that temporary resentment over decisions running athwart the opinions of certain classes or sections of the country leads from time to time to demands for changes in the Judiciary system. It has been contended, and with a certain amount of force, that the Court should impose a further voluntary limitation on its power, by announcing that it would decline to regard the

[1] *McCray* v. *United States* (1904), 195 U. S. 27, 54; *Atkin* v. *Kansas* (1903), 191 U. S. 207, 223.

unconstitutionality of a statute as "plain", "clear", "palpable" or "unmistakable", in any case in which one or more Judges should consider the statute to be valid; the adoption of such a practice would render impossible most of the "five to four" decisions, which have been so productive of lessened popular respect.[1] It has been suggested that the voluntary elimination or restriction of the now increasing practice of filing dissenting opinions would also tend to strengthen public confidence; on the other hand, such opinions are often of high value in the future development of the law and legislation.[2] More radical suggestions have been made for Constitutional Amendments establishing an elective Court or a Court appointed for a term of years; but such propositions have never yet found any substantial support, since it is manifest that they could only result in making the Judiciary less independent and more politically partisan. Changes have also been suggested in the direction of restricting the appellate jurisdiction of the Court; but such legislation would result in leaving final decision of vastly important National questions in the State or inferior Federal Courts, and would effect a disastrous lack of uniformity in the construction of the Constitution, so that fundamental rights might vary in differ-

[1] For an admirable discussion of this whole subject, see *Constitutional Decisions by a Bare Majority of the Court*, by Robert G. Cushman, *Mich. Law Rev.* (1921), XIX, *citing* the views of many modern jurists *pro* and *con;* see also *Five to Four Decisions of the Supreme Court of the United States*, by Fred A. Maynard, *Amer. Law Rev.* (1920), LIV, *Dissenting Opinions, Green Bag* (1902), XVII.

[2] See *Dissenting Opinions of Mr. Justice Daniel*, by Judge Henry B. Brown, *Amer. Law Rev.* (1887), XXI; *Dissenting Opinions of Mr. Justice Harlan*, by Judge Henry B. Brown, *ibid.* (1912), XLVI; *Dissenting Opinions*, by V. H. Roberts, *ibid.* (1905), XXXIX; *Great Dissenting Opinions*, by Hampton L. Carson, *Albany Law Journ.* (1894), L. See also, for statement of the value of dissenting opinions, Story, J. (diss.), in *Briscoe* v. *Bank* (1837), 11 Pet. 257; White, J. (diss.), in *Pollock* v. *Farmers Loan and Trust Co.* (1895), 157 U. S. 429; White, J. (diss.), in *Henry* v. *A. B. Dick Co.* (1912), 224 U. S. 1; Moody, J. (diss.), in *Employers' Liability Cases* (1908), 207 U. S. 463.

ent parts of the country. As was conclusively said fifty years ago, when the most serious efforts were made thus to weaken the Court: "If the Judges of the Union are silenced, those of the States will be left entirely uncontrolled. Remove the supervisory functions of the National Judiciary, and these laws will become the sport of local partisanship; upheld in one commonwealth, they will be overthrown in another and all compulsive character will be lost. . . . To restrict their jurisdiction and weaken their moral power is, therefore, to sacrifice in a most unnecessary manner that department of the Government which more than any other will make National ideas triumphant, not only in the legislation of today but in the permanent convictions of the people." [1] As to the proposition, formerly much advocated, to abolish the Court entirely and to place final power of judicial decision in the United States Senate, no trace of support can now be found.

To the proposal, advanced at various times of intense party passion, that the Court should be increased in number in order to overcome a temporary majority for or against some particular piece of legislation, the good sense of the American people has always given a decided disapproval; even mere partisan politicians see clearly that the employment of such an expedient is a weapon which may be equally used against them by their political opponents and may therefore prove disastrous in the long run; and James Bryce has eloquently set forth the true foundation of the Court's security against such an effort to turn the course of justice: "What prevents such assaults on the fundamental law — assaults which, however immoral in substance, would be perfectly legal in form? Not the mechan-

[1] *Nation*, Feb. 20, 1868.

ism of government, for all its checks have been evaded. Not the conscience of the Legislature and the President, for heated combatants seldom shrink from justifying the means by the end. Nothing but the fear of the people, whose broad good sense and attachment to the great principles of the Constitution may generally be relied on to condemn such a perversion of its forms. Yet if excitement has risen high over the country, a majority of the people may acquiesce; and then it matters little whether what is really a revolution be accomplished by openly violating or by merely distorting the forms of law. To the people we come sooner or later: it is upon their wisdom and self-restraint that the stability of the most cunningly devised scheme of government will in the last resort depend." [1]

No institution of government can be devised which will be satisfactory at all times to all people. But it may truly be said that, in spite of necessary human imperfections, the Court today fulfills its function in our National system better than any instrumentality which has ever been advocated as a substitute. Very apposite are the sentiments expressed by a lawyer in the anxious days of the Republic, just before the *Dred Scott Case*, as follows: "Admit that the Federal Judiciary may in its time have been guilty of errors, that it has occasionally sought to wield more power than was safe, that it is as fallible as every other human institution. Yet it has been and is a vast agency for good; it has averted many a storm which threatened our peace, and has lent its powerful aid in uniting us together in the bonds of law and justice. Its very existence has proved a beacon of safety. And now, when the black cloud is again on the horizon, when the trem-

[1] *The American Commonwealth* (1888), by James Bryce, I, 269.

bling of the earth and the stillness of the air are prophetic to our fears, and we turn to it instinctively for protection, let us ask ourselves, with all its imagined faults, what is there that can replace it? Strip it of its power, and what shall we get in exchange? Discord and confusion, statutes without obedience, Courts without authority, an anarchy of principles, and a chaos of decisions, till all law at last shall be extinguished by an appeal to arms." [1]

[1] *Amer. Law Reg.* (1856), IV, 129. See also *American Government and Politics* (1910), by Charles A. Beard, 314: "Some obvious lessons seem to come from a dispassionate review of the judicial conflicts which have occurred in our history. Criticism of the Federal Judiciary is not foreign to political contests; no party when it finds its fundamental interests adversely affected by judicial decisions seems to hesitate to express derogatory opinions; the wisest of our statesmen have agreed on the impossibility of keeping out of politics decisions of the Supreme Court which are political in their nature; finally, in spite of the attacks of its critics and the fears of its friends, the Supreme Court yet abides with us as the very strong tower defending the American political system."

CHAPTER ONE

THE FIRST COURT AND THE CIRCUITS

1789–1792

"It is perhaps not difficult to say which is the most arduous task, that of the Convention who framed the Constitution, or of the first Legislatures to whom it will appertain to mature and perfect so compound a system, to liquidate the meaning of all the parts, and adjust them to each other in a harmonious and consistent whole," said a Federalist pamphleteer in 1792;[1] and these words quaintly and accurately portrayed the task which was imposed upon the first Supreme Court, as well as upon the first Congress. That President Washington had a full comprehension of the responsibility which lay upon him in making the appointments to this first Court, and of the potent influence which the Court was to exercise upon the history of the country, was shown by his letter to his future Attorney-General, Edmund Randolph. "Impressed with a conviction that the true administration of justice is the firmest pillar of good government," he wrote, "I have considered the first arrangement of the judicial department as essential to the happiness of our country and the stability of its political system. Hence the selection of the fittest characters to expound the laws and dispense justice has been an invariable sub-

[1] *An Enquiry as to the Constitutional Authority of the Supreme Federal Court over the Several States in Their Political Character* (1792), by a citizen of South Carolina (David Ramsay).

ject of my anxious concern." [1] Imbued with such belief in the high destiny of the tribunal, Washington had been considering possible candidates for appointment upon the Court, for some months before the passage of the Judiciary Act; and the tests which he intended to apply to all appointments he had nobly set forth in a letter to Chancellor Livingston of New York, in the preceding May. "When I accepted of the important trust committed to my charge by my country," he had written, "I plainly foresaw that the part of my duty which obliged me to nominate persons to office would, in many instances, be the most irksome and unpleasing; for, however desirous I might be of giving a proof of my friendship, and whatever might be his expectations, grounded upon the amity which had subsisted between us, I was fully determined to keep myself free from every engagement that could embarrass me in discharging this part of my administration. I have therefore declined giving any decisive answer to the numerous applications which have been made to me; being resolved, whenever I am called upon to nominate persons for those offices which may be created, that I will do it with a sole view to the public good, and shall bring forward those who, upon every consideration and from the best information I can obtain, will in my judgment be most likely to answer that great end." And to Nathaniel Gorham, he had written: "The most delicate and in many instances the most unpleasing part of my administration will be the nomination to offices. . . . This consolation, however, will never quit me, that the interest of the American Union shall be the great object in view and that no means in my power shall be left untried to find out and bring forward such persons as have the best claims.

[1] *Washington*, X, letter of Sept. 27, 1789.

upon every consideration are the most deserving and will be most likely to promote this important end." [1]

On September 24, the day on which he affixed his signature to the Judiciary Act, Washington sent in to the Senate the names of his appointees to the Supreme Court of the United States constituted by that statute. Of all appointments to be made, that of Chief Justice of the United States was by far the most important and had given to the President the greatest concern. Rightly he felt that the man to head this first Court must be not only a great lawyer, but a great statesman, a great executive and a great leader as well. Many eminent names were presented to him. Among the earliest and probably the most illustrious as a jurist was that of James Wilson of Philadelphia, who, on April 21, 1789, addressed himself to Washington as an aspirant for the place in the following interesting letter: [2]

A delicacy arising from your situation and character as well as my own has hitherto prevented me from mentioning to your Excellency a subject of much importance to me. Perhaps I should not even now have broke silence but for one consideration. A regard to the dignity of the Government over which you preside will naturally lead you to take care that its honours be in no event exposed to affected indifference or contempt. For this reason, you may well expect that, before you nominate any gentleman to an employment (especially one of high trust), you should have

[1] *Washington Papers MSS*, letters to Robert R. Livingston, May 31, 1789, and Nathaniel Gorham, May 7, 1789; see also *Washington*, X, letter to Edward Rutledge, May 5, 1789. To his nephew Bushrod Washington, who sought to be appointed United States Attorney, Washington wrote, July 27, 1789: "My political conduct in nominations, even if I were uninfluenced by principle, must be exceedingly circumspect and proof against just criticism, for the eyes of Argus are upon me, and no slip will pass unnoticed that can be improved into a supposed partisanship for friends or relatives."

[2] This letter, hitherto unpublished, is in the Library of Congress; see *Calendar of Applications and Recommendations for Office under the Presidency of George Washington* (1901), by Gaillard Hunt.

it in your power to preclude him, in case of disappointment, from pretending that the nomination was made without his knowledge or consent. Under this view, I commit myself to your Excellency without reserve and inform you that my aim rises to the important office of Chief Justice of the United States. But how shall I proceed? Shall I enumerate reasons in justification of my high pretensions? I have not yet employed my pen in my own praise. When I make those high pretensions and offer them to so good a judge, can I say that they are altogether without foundation? Your Excellency must relieve me from this dilemma. You will think and act properly on the occasion, without my saying anything on either side of the question.

Friends of John Rutledge of South Carolina were insistent that his seniority and distinction in professional studies and his services to his country entitled him to the position. The name of Robert R. Livingston, the distinguished Chancellor of New York, was warmly urged, and his judicial career, as well as his service in bringing about the ratification of the Constitution in New York, warranted his appointment; but Livingston's aspirations fell afoul of the complicated situation in New York politics — that which John Adams in his old age used to term "the Devil's own incomprehensibles." For six months, a bitter fight had been waging between the faction headed by the Livingstons and Governor George Clinton (an Anti-Federalist) and the ultra-Federalists headed by Alexander Hamilton and General Philip Schuyler, over the choice of United States Senators; the two houses of the Legislature had split over the method of election and over the choice of Rufus King, who was favored by Hamilton; as a result, New York had been left unrepresented in the first session of the First Senate; this situation and Hamilton's antagonism rendered Living-

ston's appointment impossible.[1] John Jay, one of the leading expounders of the Constitution, then acting as Secretary of Foreign Affairs, and a close personal friend of Washington's, was said to have been offered the choice of retaining his position in the Cabinet or taking the Chief Justiceship.[2] That Alexander Hamilton might be offered the position was evidently gravely feared by some; for a citizen of Maryland wrote to Washington as to rumors "that the Chief will not be a native of America. . . . Nine tenths of the best friends to America will ever be averse to a foreign Judge", and he expressed the hope that Robert H. Harrison, the Chief Judge of Maryland, would be appointed — "the best man in the Union for the head of the Judiciary, best calculated to inspire confidence and love among our people . . . though from his retired habits not so well known throughout America as many men of high character who perhaps are not near so perfect . . . his virtues and character are not hidden from the impartial President of the United States." [3]

The President's decision finally fell upon John Jay of New York. "It is with singular pleasure that I address you as Chief Justice of the Supreme Court of the United States, for which office your commission is enclosed," wrote Washington. "In nominating you

[1] See *Hamilton* (Lodge's ed.), VIII, 208, note; *History of Political Parties in the State of New York* (1846), by Jabez W. Hammond, I, 30, 36; *Columbian Centinel*, Oct. 24, 1801; *The Livingstons of Livingston Manor* (1900), by Edward E. Livingston, 332.

[2] William Jay in his *Life of John Jay* (1873), II, 274, said: "The President's opinion of Mr. Jay's ability and disposition to serve his country induced him to ask his acceptance of any office he might prefer." Washington wrote to Madison, Aug. 9, 1789: "I have had some conversation with Mr. Jay respecting his views to office which I will communicate to you at our first interview." *Washington*, X.

S. A. Otis wrote to John Langdon in Sept., 1789: "The Keeper of the Tower is waiting to see which salary is best, that of Lord Chief Justice or Secretary of State." *Letters of Washington, Jefferson and Others to Langdon* (1880), 92.

[3] *Washington Papers MSS*, letter signed "Civis", Sept. 1, 1789.

for the important station which you now fill, I not only acted in conformity to my best judgment, but I trust I did a grateful thing to the good citizens of these United States; and I have a full confidence that the love which you bear to our country, and a desire to promote the general happiness, will not suffer you to hesitate a moment to bring into action the talents, knowledge and integrity which are so necessary to be exercised at the head of that department which must be considered as the keystone of our political fabric."[1] While Jay was only in his forty-fourth year, and while his practice as a lawyer had been of short duration and his only previous judicial service had been two years (from 1775 to 1777) as Chief Justice of New York, nevertheless, the distinction, the sagacity and the powers of leadership which had characterized his military, political and diplomatic career since 1774, marked him as preëminently qualified for the responsibilities of the high post to which he was now called.[2]

In the selection of the remaining five Judges, Washington was confronted with an even more difficult problem, since the three States of Virginia, Pennsylvania and South Carolina presented an unusual number of

[1] *Washington*, X, letter of Oct. 5, 1789. To this, Jay replied: "When distinguished discernment and patriotism unite in selecting men for stations of trust and dignity, they derive honour not only from their offices, but from the hand which confers them. With a mind and a heart impressed with these reflections and their correspondent sensations, I assure you that the sentiments expressed in your letter of yesterday and implied by the commission it enclosed, will never cease to excite my best endeavours to fulfil the duties imposed by the latter, and as far as may be in my power, to realize the expectations which your nominations, especially to important places, must naturally create." *Jay*, III, letter of Oct. 6, 1789.

[2] "A sound judgment improved by extensive reading, and great knowledge of public affairs, unyielding firmness and inflexible integrity were qualities of which Mr. Jay had given frequent and signal proofs," was the characterization which John Marshall later made of his friend and predecessor. *Life of Washington* (1807), by John Marshall, V, 215. Washington wrote to Lafayette, June 3, 1790, that his appointments of Jay at the head of the Judiciary and of Jefferson, Hamilton and Knox as Cabinet officials "generally have given perfect satisfaction to the public."

qualified candidates. From Virginia, the names most prominently mentioned were Edmund Pendleton, George Wythe, Arthur Lee and John Blair. Of his perplexity in choosing, Washington wrote to James Madison:[1] "My solicitude for drawing the first characters of the Union into the Judiciary is such that my cogitations on the subject last night, after I parted with you have almost determined me, as well for the reason just mentioned, as to silence the clamors, or more properly soften the disappointment of smaller characters, to nominate Mr. Blair and Colonel Pendleton as Associate and District Judge, and Mr. Edmund Randolph for the Attorney General, trusting to their acceptance. Mr. Randolph I would prefer in this character to any person I am acquainted with of not superior abilities, from habits of intimacy with him. Mr. Pendleton could not, I fear, discharge, and in that case I am sure would not undertake, the duties of an Associate under the present form of the Act. But he may be able to fulfill those of the District. The salary, I believe, is greater than what he now has; and he would see, or it

[1] *Washington*, X, letter of Aug. 10, 1789; Arthur Lee had applied for appointment, May 31, 1789 (see letter in Library of Congress), as follows: "It is not without apprehension of presuming too much on the favor you have always shown me that I offer you my services as a Judge of the Supreme Court which is now establishing. The having been called to the Bar in Westminster Hall after five years study at the Temple and having practised the law there for some time are the ground, Sir, on which I presume to ask your protection. I quitted the line of the law in England, where much was to be expected from the pursuit of it and with the fairest prospects, at the moment my country called upon me to aid in supporting her violated rights. With what fidelity I discharged the trust she reposed in me, the records of the Office of Foreign Affairs will show. To return to the profession I had chosen, in a station not unbecoming those in which I have acted, is my most earnest desire. It would be an additional satisfaction to be distinguished by your appointment, Sir, and to assist in distributing equal justice to a well-governed people." As to this letter Washington, writing to Madison in Aug., 1789, said: "What can I do with A(rthur) L(ee)? He has applied to be nominated one of the Associate Judges; but I cannot bring my mind to adopt the request. The opinion entertained of him by those with whom I am most conversant is unpropitious; yet few men have received more marks of public favor and confidence than he has. These contradictions are embarrassing."

might be explained to him, the reason of his being preferred to the District Court rather than to the Supreme Court; though I have no objection to nominating him to the latter, if it is conceived that his health is competent, and his mental faculties are unimpaired by age." [1] John Blair, whom Washington finally selected, was a man of fifty-seven years of age, and had served ten years on the State Courts of Virginia as Chief Justice of the Court of Appeals and as a Judge of the High Court of Chancery.

From Massachusetts, it had been the general expectation that John Lowell, who had served as Judge of the Court of Appeals under the old Confederation, would receive the appointment; and he had been warmly indorsed by Washington's intimate personal friends. General Benjamin Lincoln had written: "I consider, my dear General, that not only the happiness of the people under the new government, but that the very existence of it depends, in a great measure,

[1] Edmund Randolph, writing to Madison as early as July 19, 1789, said that Col. Griffin "had written him July 10, stating that he had had 'a long conversation with our worthy President on the subject of officers of the Judiciary and the customs. He appears very anxious to know whether any of the gentlemen who are now in the Judiciary department in the State of Va., would prefer the Continental establishment and mentioned Mr. Pendleton, Mr. Wythe, Mr. Lyons and Mr. Blair, and asked me whether you had ever intimated a wish to serve in that or any other line under the Federal government. May I ask the favor of you to sound Mr. W(ythe) and Mr. B(lair) on the subject. I have written to Mr. Marshall relative to the wishes of Mr. P(endleton) and Mr. L(ee).'" *Omitted Chapters of History Disclosed in the Life and Papers of Edmund Randolph* (1888), by Moncure D. Conway, 126.

Similar views as to possible candidates had been expressed by Joseph Jones of Virginia to Madison as early as June 24, 1789, *Mass. Hist. Soc. Proc. 2d Series*, XV: "Virginia ought to have one. . . . Of our Judges, Pendleton, Wythe, Blair, would either of them answer well? The first will, I fear, be unable to execute his present office long; the others are qualified and able, if they would act. Among the lawyers, I know of none but Randolph. It is of the first consequence to have your Supreme Court of able lawyers and responsible characters"; see also letters of Washington to Joseph Jones, May 14, 1789, and to Edmund Randolph, Nov. 30, 1789, explaining that the reason for not appointing George Wythe to the Federal Judiciary was Wythe's preference to remain a State Judge; and see report of Randolph to Washington, Dec. 15, 1789: "Wythe sits in a kind of legal monarchy which to him is the highest possible gratification."

upon the capacity and ability of those who may be employed in the Judiciary. . . . The common voice of the people here points out Mr. Lowell as a gentleman well qualified to fill one of the seats upon the Superior Court. . . . It is an office which, to fill with honour and dignity, requires an honest heart, a clear head and a perfect knowledge of law in its extensive relation."[1] When it became known that Washington was considering passing over Lowell and appointing William Cushing, the Chief Justice of the Massachusetts Supreme Judicial Court, a strong and interesting protest was made by Christopher Gore in a letter to Rufus King of New York:[2]

The appointments to the Judicial seats will soon be made. We flatter ourselves in Massachusetts that one of the Supreme Court will be taken from this State. The general expectation is that our friend Lowell will be appointed an Associate Judge; and no doubt was ever entertained of this event till we heard that our Chief Justice was in nomination. Should the Chief Justice be appointed, we shall lose an excellent man whose talents are peculiarly fitted for the place he fills, without rendering any great service to the United States; and a very good man will be extremely mortified. The Chief Justice, now 56 years of age, cannot long be an active member of the Court, and he has new habits and new modes of legal decision to acquire. On these grounds, I much doubt if he would be an acquisition to the Union, or at least so great an acquisition to the Government as Lowell; but in addition to all

[1] See letter of July 18, 1789, from Lincoln, also indorsement of Lowell by Elbridge Gerry, *Calendar of Applications* (1901), by Gaillard Hunt; *Office Seeking during Washington's Administration, Amer. Hist. Rev.* (1896), I, 270. Fisher Ames also favored the appointment of Lowell, letter of Aug. 12, 1789, *Works of Fisher Ames* (1854), I.

[2] *King*, I, letter of Aug. 6, 1789. Cushing's appointment was opposed by the strong Federalists in Massachusetts, who feared that his removal from the State Bench would give to Governor John Hancock, an Anti-Federalist, an opportunity to appoint the determined foe of all Federalists, James Sullivan; see letter of Stephen Higginson to John Adams, *Amer. Hist. Ass. Rep.* (1896), I, 767; *William Cushing*, by Arthur P. Rugg, *Yale Law Journ.* (1920), XXX.

the consequences, which will be apparent in your mind, to taking him from our State bench, Lowell's situation from such neglect of him will be intolerable. Having held a similar rank under the old Confederation, which commission is superseded only by the adoption of the new Government, the neglect to appoint him to the Supreme Court will imply a conviction in the mind of him who appoints, that he had been tried and found wanting. This certainly will be disgraceful to a very good and able man. From a regard to the happiness and welfare of this State, and a wish that the expectations of a valuable part of the community should not be disappointed, and that an honorable and good man should not be extremely mortified, I request your attention and influence in this appointment, and I am sure, if you see no just reason on National grounds for preferring Cushing to Lowell, you will endeavor that the latter shall not be disgraced.

In spite of these arguments, Washington decided to appoint Cushing, who had served for nine years as Chief Justice in Massachusetts and was then fifty-seven years old — the oldest man chosen on the new Court.

In Pennsylvania, the President's field of choice was wide, for eminent lawyers were numerous. Thomas McKean, who had been Chief Justice of that State for twelve years, was strongly urged by many and had early filed an application for appointment, writing that he had "an ambition to share in Your Excellency's Administration" and that he hoped it would not "be deemed indelicate in me to give a short account of myself and my studies": [1]

My character must be left to the World. I have lived in troublesome times in an unsettled and tumultuous government. A good Judge cannot be very popular, but I believe that my integrity has never been called in question; and it is certain that no judgment of the Supreme Court of Pennsylvania since the Revolution has been

[1] See letter of April 27, 1789, *Calendar of Applications* (1901), by Gaillard Hunt, in Library of Congress.

reversed or altered in a single iota. A book of reports by Counsellor Dallas is now in the press here and will be abroad in about two months, from which some judgment may be formed in the other States of our decisions. I will only add that I am by habit and by inclination the man of business. Your Excellency will be pleased to excuse this particular self-detail when it shall be considered that, if you think fit to advance me to this station, my reputation will become in a degree your interest, and my pretensions should be known. . . . For this freedom, I must trust to your great goodness. It is (tho I am not three years younger than Your Excellency) my first essay of the kind. If you shall approve of this overture, I promise you to execute the trust with assiduity and fidelity and according to the best of my abilities, the only return that I can make, and that, I know, you wish for. There is but one thing more I have to say and that is, if you make a single enemy or loose a single friend by gratifying my desire, I most sincerely beg you never spend a thought on the subject.

It was fortunate for the successful working of the new Federal Government that McKean's wishes were not gratified; for he soon became a radical State-Rights advocate and proclaimed from the State Bench that the Constitution was "a league or treaty made by the individual States as one party and all the States as another"; and that in case of a difference of opinion as to the construction of the Constitution "there was no provision in the Constitution that the Judges of the Supreme Court of the United States shall control and be conclusive." This was the doctrine upheld by Calhoun in later years, but far removed from the constitutional views of Jay and Marshall. It is probable that Washington, however, decided against McKean more by reason of his defects of temper than of opinion.[1]

[1] See opinion of McKean, C. J., in *Respublica* v. *Cobbett* (1798), 3 Dallas, 467. Owen Wister in *The Supreme Court of Pennsylvania, Green Bag* (1891), III, graphically portrayed McKean "with perpetually assailed and never tarnished honor;

Moreover, it was unquestionably the fact that the best qualified lawyer in Pennsylvania, as well as the statesman most familiar with the proceedings of the Federal Convention, was James Wilson, a native of Scotland, forty-seven years of age, who had practiced at the Philadelphia Bar for eleven years, and who had been an aspirant for the Chief Justiceship; and Washington found no difficulty in deciding upon his appointment.

From Maryland, Washington appointed his former military private secretary and close personal friend, Robert Hanson Harrison, a man of forty-four years, who had been Chief Judge of the General Court of Maryland for eight years. That he entertained a more personal interest in this nomination than in any other was shown by the fact that he addressed to Harrison (and to no other Judge except Rutledge) a personal letter, in the course of which he said: "Your friends and your fellow citizens, anxious for the respect of the Court to which you are appointed, will be happy to learn your acceptance, and no one among them will be more so than myself." [1] Five days after his confirmation, Harrison was chosen Chancellor of Maryland, and preferring that post to the laborious position on the Federal Court decided to decline the latter, in spite of Washington's urgent request to the contrary, and notwithstanding an urgent letter from his old comrade-in-arms, Alexander Hamilton, who wrote: [2]

After having labored with you in the common cause of America during the late war, and having learned your value,

riding roughshod over everyone who opposed him; haughty and uncompromising; hated by many, respected by most and feared by all; invariably plainly prompted by his sincere and ferocious belief in himself."

[1] *Washington Papers MSS*, letterbook, letter of Sept. 28, 1789.

[2] *Hamilton* (Lodge's ed.), VIII, letter of Nov. 27, 1789; *Washington*, X, letter of Washington, Nov. 25, 1789, urging Harrison to accept, and saying that contemplated changes in the Judiciary Act would allow him time to pay attention to his private affairs.

judge of the pleasure I feel in the prospect of a reunion of efforts in this same cause; for I consider this business of America's happiness as yet to be done. In proportion to that sentiment has been my disappointment at learning that you had declined a seat on the Bench of the United States. Cannot your determination, my dear friend, be reconsidered? One of your objections, I think, will be removed; I mean that which relates to the nature of the establishment. Many concur in opinion that its present form is inconvenient, if not impracticable. Should an alteration take place, your other objection will also be removed, for you can then be nearly as much at home as you are now. If it is possible, my dear Harrison, give yourself to us. We want men like you. They are rare at all times.

In Harrison's place, Washington appointed James Iredell of North Carolina, who was commissioned February 10, 1790, and took his seat on the Bench at the second Term of the Court in August, 1790. Iredell was only thirty-eight years old and had been Attorney-General of his State.

From South Carolina, the President hesitated between the appointment of Charles Cotesworth Pinckney, John Rutledge and Edward Rutledge. William H. Drayton was also urged upon him. Finally his choice fell on John Rutledge, a man of fifty years of age, who had been a former Governor of the State and a Judge of the State Court of Chancery for the past six years.[1] Of the warmth of feeling which Washington had for his appointee, evidence was given in a personal

[1] *South Carolina Federalist Correspondence, 1789-1797, Amer. Hist. Rev.* (1906), XIV, letter of Ralph Izard to Edward Rutledge, Sept. 21, 1784. Izard continued as follows: "The President asked me before the nominations were made whether I thought your brother John, General Pinckney, or yourself would accept of a Judge in the Supreme Court. I told him that I was not authorized to say that you would not, but intimated that the office of Chief Justice would be most suitable to either of you. That, however, was engaged. . . . The President will not appoint any but the most eminent; and if none in South Carolina of that description will accept, he will be obliged to have recourse to some other State."

letter.[1] "Regarding the due administration of justice as the strongest cement of good government, I have considered the first organization of the Judicial Department as essential to the happiness of our citizens and to the stability of our political system. Under this impression, it has been an invariable object of anxious solicitude with me to select the fittest characters to expound the laws and dispense justice. This sentiment, sir, has overruled in my mind the opinions of some of your friends, when they suggested that you might not accept an appointment on the Supreme Bench of the United States. The hesitation which those opinions produced was but momentary, when I reflected on the confidence which your former services had established in the public mind and when I exercised my own belief of your dispositions still further to sacrifice to the good of your country. In any event, I concluded that I should discharge the duty which I owe to the public by nominating to this important office a person whom I judged best qualified to execute its functions, and you will allow me to repeat the wish that I may have the pleasure to hear of your acceptance of the appointment." Because of the insistence of this letter, Rutledge consented to accept, although both he and his friends still retained the view that he ought to have been offered the Chief Justiceship.[2]

All of these six members of the new Court were men in the prime of life, the oldest being fifty-seven and the youngest thirty-eight; all but two had previous judicial experience; and of the general acceptability of these appointments, there was much evidence in contemporary letters. Ralph Izard of Charleston wrote to Edward Rutledge, stating that he had just

[1] *Washington Papers MSS*, letterbook, letter of Sept. 28, 1789.
[2] *Washington Papers MSS*, letter of Rutledge, June 12, 1795, *infra*, 127.

returned from the Senate where the Judges "had been approved", and that they had been "chosen from among the most eminent and distinguished characters in America, and I do not believe that any Judiciary in the world is better filled." John Brown, a Congressman from Kentucky, after reciting the nominations, wrote: "Our public affairs in every department go on so smoothly and with such propriety that I entertain sanguine hopes that the present Government will answer all the reasonable expectation of its friends. Judgment, impartiality and decision are conspicuous in every transaction of the President, and from the appointments which he has made there is every reason to expect that the departments will be conducted with justice and ability." [1] Moreover, with great wisdom, the President had deemed it advisable to call to the high function of interpreting the Constitution men who had been instrumental in making it; for Rutledge, Wilson and Blair had been members of the Federal Convention of 1787, and signers of the Constitution; while Jay, Iredell, Wilson and Cushing had been leaders in their respective State Conventions in aiding ratification of the Constitution.[2] Of the high dignity and importance of the positions which these men were to fill, Washington's full comprehension was again shown in the formal official letter which he addressed to each. "I experience peculiar pleasure in giving you notice of your appointment to the office of an Associate Judge in the Supreme Court of the United States,"

[1] *Harry Innes Papers MSS*, letter of Sept. 28, 1789.

[2] Later, Paterson and Ellsworth, who were members of the Federal Convention of 1787, were appointed on the Court. *Economic Origins of Jefferson Democracy* (1915), by Charles A. Beard, 102–105. Of the thirty-nine men who signed the Constitution, twenty-six found a place in the new Government, either by election or appointment, and of three members of the Federal Convention who favored but did not sign the Constitution, two were elected Senators and one was appointed Attorney-General.

he wrote. "Considering the judicial system as the chief pillar upon which our National Government must rest, I have thought it my duty to nominate, for the high offices in that department, such men as I conceived would give dignity and lustre to our National character, and I flatter myself that the love which you bear to our country and a desire to promote the general happiness will lead you to a ready acceptance of the enclosed commission which is accompanied with such laws as have passed relative to your office." [1]

On Monday, February 1, 1790, the day appointed for its organization, the Supreme Court of the United States met in New York, in the Royal Exchange, a building located at the foot of Broad Street. "The Court Room at the Exchange was uncommonly crowded," said the newspapers of the day. "The Chief Justice and other Judges of the Supreme Court of this State, the Federal Judge for the District of New York, the Mayor and Recorder of New York, the Marshal of the District of New York, the Sheriff and many other officers, and a great number of the gentlemen of the Bar attended on the occasion." [2] Since, however, in spite of the importance of the event, only three of the Judges were present, Jay, Wilson and Cushing, the Court adjourned to the next day at one

[1] *Washington*, X, letters of Sept. 30, 1789. The nominations of the Judges were sent in to the Senate, Sept. 24, and were confirmed, Sept. 26.

[2] Full accounts were published in the New York and Philadelphia papers and copied in papers throughout the country; *New York Daily Advertiser*, Feb. 3, 10, 11, 1790; *Pennsylvania Packet* (Phil.), Feb. 6, 11, 16, 1790; *Federal Gazette* (Phil.), Feb. 4, 6, 8, 10, 1790, stating the Court met "at the Assembly Chamber, New York"; *New York Journal*, Feb. 4, 1790, and *Freeman's Journal* (Phil.), Feb. 10, 1790, said "a very numerous and respectable auditory attended."

It is a curious fact that the very first line in the official written minutes of the Court, kept by the Clerk, contained an error. It reads as follows: "In the Supreme Judicial Court of the United States." The word "Judicial" of course improperly appears in the official title of the Court, and was undoubtedly inserted by the Clerk (who was a Massachusetts man) because of the fact that in Massachusetts, the official title of its highest Court was the "Supreme Judicial Court."

o'clock, the Judges attending a dinner given that evening by the President. On February 2, Judge Blair and Attorney-General Edmund Randolph, having arrived from Virginia, the Court was organized (as stated in the newspapers) "at the Hall of the Exchange, the Marshal of New York (Mr. Smith) attended, and Mr. McKesson officiated as clerk. The jury from the District Court attended; some of the members of Congress and a number of respectable citizens also. As no business appeared to require immediate notice, the Court was adjourned."[1] The published record of the ceremony (with its quaint penalty of imprisonment in case silence should be broken during the reading of the commissions) was as follows:[2]

Proclamation was made and the Court opened. Proclamation was made for silence, while the letters patent of the Justices present are openly read, upon pain of imprisonment; whereupon letters patent under the Great Seal of the United States bearing test on the 26th day of September last, appointing the said John Jay, Esq., Chief Justice; letters patent bearing test the 27th day of September last, appointing the said William Cushing, Esq., an Associate Justice; letters patent bearing test the 29th day of September last, appointing the said James Wilson, Esq., an Associate Justice; and letters patent bearing test the 30th day of September last, appointing the said John Blair, Esq., an Associate Justice of this Court, were openly read.

Letters patent to Edmund Randolph of Virginia, Esq., bearing test the 26th day of September last aforesaid appointing him Attorney General for the United States were openly read.

[1] See also *Iredell*, II, letter of Samuel Johnson to Iredell, Feb. 1, 1790.

[2] See also the more concise official minutes of the Court in 134 U. S. App. In the proceedings of this first session of the Court, no record is made of any oath being administered to the Judges. It is probable that each took the oath separately, for it is known that Wilson was sworn before the Mayor of Philadelphia, Oct. 5, 1789; see *History of the Supreme Court* (1891), by Hampton L. Carson, 148.

Ordered that Richard Wenman be and he is hereby appointed Crier of the Court.

The Court adjourned until tomorrow at one o'clock in the afternoon.

At this first session, the Judges were attired in robes, probably of black and red, since a contemporary Senator described them as "party-colored";[1] and it is evident that considerable impression was made upon the public by this costume, for a Philadelphia newspaper, a little later, remarked upon the appearance of the Judges "in their robes of Justice, the elegance, gravity and neatness of which were the subject of remark and approbation with every spectator."[2]

On Wednesday, February 3, the Court met again, chose John Tucker of Massachusetts as its Clerk, and passed an order as to the form of the seal of the various

[1] William Allen Butler, as quoted in the account of the Centennial Celebration of the organization of the Federal Judiciary, in 134 U. S. Appendix, 712, stated that Jay wore "an ample robe of black silk with salmon colored facings", which according to family tradition was the gown of a Doctor of Laws of the University of Dublin which had conferred a degree upon Jay; and Butler stated that "the Associate Justices wore the ordinary black robe which has since come into vogue as the vestment of all the members of the Court." This latter statement appears to be erroneous; for Senator Mason, speaking in the Senate in 1802 (*7th Cong., 1st Sess.*, June 13, 1802, 69), referred to: "A State upon her knees before six venerable Judges decorated in party-colored robes, as ours formerly were, or arrayed in more solemn black such as they have lately assumed."

G. C. Hazelton, Jr., in *History of the National Capitol* (1897), 142, 154, quotes Benjamin Harrison (the elder) as saying that the question of the Court attire was a subject of discussion by public men of the day, and that "Jefferson was against any needless official apparel, but if the gown was to carry, he said: 'For Heaven's sake, discard the monstrous wig which makes the English Judges look like rats peeping through bunches of oakum!' Hamilton was for the English wig with the English gown. Burr was for the English gown but against the inverted wool sack termed a wig! The English gown was taken and the wig left." Henry Flanders in his *Lives of the Chief Justices* (1858), I, 37, speaks of the excitement caused by the appearance of Judge Cushing in his old-fashioned judicial wig on his arrival in New York, and that "returning to his lodgings, he sent for a perukemaker and obtained a more fashionable covering for his head. He never again wore the professional wig." An English traveler, writing of Washington in 1828, stated, on the other hand, that the Judges of the Supreme Court "commenced with wigs and scarlet robes, but soon discarded them as inconvenient." *Notions of the Americans* (1850), by J. P. Cooper, II, 48.

[2] See *New York Daily Advertiser*, Feb. 21, 1792; *Gazette of the United States*, Feb. 11, 1792; *Providence Gazette* (R. I.), Feb. 25, 1792.

Federal Courts. On Friday, February 5, the first practitioners before its Bar were admitted as counselors—Elias Boudinot of New Jersey, Thomas Hartly of Pennsylvania, and Richard Harison of New York, and Rules of Court were adopted as to the form of writs, and as to the admission of counselors and attorneys.[1] On Monday, Tuesday, and Wednesday, February 8, 9, and 10, the only business transacted was the admission of sixteen further counselors and seven attorneys.[2] Of these nineteen counselors admitted at this first Term, it is interesting to note that two were Senators and nine were Representatives present in New York attending the First Congress; of the remaining eight non-officials, six were lawyers from New York, and two from New Jersey. Three weeks later, on March 4, 1790, Arthur Lee of Virginia, who had been unable to qualify under the rule and had been admitted by special order of the Court, "took the oaths before the Chief Justice of the United States, requisite to carry into execution the special order of the Supreme Court for admitting him as counselor."[3] Of this first Federal Bar, a contemporary paper said: "Every friend to America must be highly gratified when he peruses the long list of eminent and worthy characters who have come forward as practitioners at the Federal

[1] "Ordered that (until further orders) it shall be requisite to the admission of Attorneys or Counsellors to practice in this Court, that they shall have been such for three years past in the Supreme Court of the State to which they respectively belong, and that their private and professional character shall appear to be fair."

[2] The counselors were Egbert Benson, John Lawrence, Morgan Lewis, Richard Varick of New York, and Robert Morris of Pennsylvania; Theodore Sedgwick, Fisher Ames and George Thacher of Massachusetts; William Smith of South Carolina; James Jackson of Georgia; Samuel Jones, Ezekiel Gilbert and Cornelius J. Bogert of New York; Abraham Ogden, Elisha Boudinot and William Paterson of New Jersey. The attorneys were William Houston, Edward Livingston, Jacob Morton, Bartholomew de Hart, John Keep, Peter Masterton and William Willcocks, all of New York.

[3] *New York Daily Advertiser*, March 5, 1790; *Gazette of the United States*, March 6, 1790; *Virginia Herald* (Fredericksburg), March 18, 1790.

Bar, where the most important rights of Man must, in time, be discussed and determined upon, as well those of Nations, as of individuals. Happy country! Whose Judges rendered independent — and selected for their wisdom and virtue — constitute so firm a barrier against tyranny and usurpation on the one hand, and fraud and licentiousness on the other." [1] An interesting reminder, however, of the fact that the prominence of the legal profession in bringing about the adoption of the Constitution had aligned the Anti-Federalist Party in hostility to lawyers was seen in the criticism by its newspaper organs of the number of Members of Congress admitted to the Federal Bar. "It is alarming to find so many Members of Congress sworn into the Federal Court at its first sitting in New York. The question then is whether it is proper that Congress should consist of so large a proportion of Members who are sworn attornies in the Federal Courts; or whether it is prudent to trust men to enact laws who are practising on them in another department. Let common sense answer. If Congress does consist of practising Attorneys, the laws enacted may, in a great measure, depend on the particular causes such individuals may have to manage in the Judiciary; this being the case, the property of the people may in a few years become the sport of Law-Makers acting in the capacity of interested attorneys." [2]

The session having lasted ten days and no case being on its docket for argument, the Court adjourned finally on February 10, 1790, "to the time and place appointed by law"; and in the evening of the same day,

[1] *Gazette of the United States*, March 6, 1790.

[2] *Independent Chronicle*, Sept. 23, 1790. "A writer in a Vermont paper observes that the candidates (for Congress) are generally lawyers and that they are not fit subjects of the people's choice. Make them, says he, Governors, Judges, Generals and what you will, but never make them legislators." *Columbian Centinel*, Aug. 25, 1792.

the Grand Jury of the District Court, "gave a very elegant entertainment to the Chief, Associate and District Judges, the Attorney-General, and the officers of the Supreme and District Courts at Fraunce's Tavern, in Courtlandt Street. The liberality displayed on this occasion and the good order and harmony which presided gave particular satisfaction to the respectable guests." [1] Among the thirteen toasts drunk by the "respectable guests" were the following: "The National Judiciary" and "The Constitution of our Country, may it prove the solid fabrick of liberty, prosperity and glory." That the novel experiment of a National Judiciary had awakened great interest throughout the country was significantly shown by the fact that the New York and the Philadelphia newspapers described the proceedings of this first session of the Court more fully than any other event connected with the new Government; and their accounts were reproduced in the leading papers of all the States.[2]

The second Term of the Court was held in New York on Monday, August 2, 1790, at the Exchange. The commission of James Iredell of North Carolina (who had been appointed Judge on the last day of the preceding Term, on the resignation of Robert H. Harrison of Maryland) was read, and he qualified. There being no cases ready, the Court adjourned until Tuesday, when after having admitted as counselors Richard Bassett and John Vining of Delaware it adjourned for the Term.[3]

[1] *Gazette of the United States*, Feb. 10, 1790.

[2] See among many others, the following newspapers: *Virginia Independent Chronicle* (Richmond), Feb. 17, 1790; *Virginia Herald* (Fredericksburg), Feb. 18, 25, 1790; *Augusta Chronicle* (Ga.), March 27, 1790; *New Jersey Journal*, Feb. 16, 1790; *Connecticut Journal*, Feb. 10, 1790; *Boston Gazette*, Feb. 15, 1790; *Independent Chronicle* (Boston), Feb. 11, 1790; *Salem Gazette*, Feb. 16, 1790.

[3] *Pennsylvania Gazette*, Aug. 11, 1790.

It is interesting to note that at the very outset of the new Government, Chief Justice Jay evinced that comprehension of the essential functions of the judicial power of the Court and of its duty never to express its judicial opinion except in a case litigated between parties in due judicial course, which is a fundamental principle of the American frame of government. The question was presented to him in November, 1790, by Alexander Hamilton, the Secretary of the Treasury, whether all the branches of the Government ought not to interfere and to assert their opposition to sentiments, which had recently proceeded from the Virginia Legislature and which seemed to Hamilton destructive of the principles of the government under the Constitution. At this time, excitement ran high, both in the Congress and in the Nation, over the projected Federal legislation for assumption of State debts and redemption of the public debt. The Virginia House of Representatives had passed Resolutions terming the latter bill as "dangerous to the rights and subversive of the interest of the people and demands the marked disapproval of the General Government", and denouncing the former bill as "repugnant to the Constitution of the United States, as it goes to the exercise of a power not expressly granted to the General Government." "This is the first symptom," wrote Hamilton, "of a spirit which must either be killed or it will kill the Constitution of the United States. I send the Resolutions to you that it may be considered what ought to be done. Ought not the collective weight of the different parts of the Government to be employed in exploding the principles they contain? This question arises out of sudden and undigested thought." [1]

[1] *Hamilton* (Lodge's ed.), VIII, letter of Hamilton to Jay, Nov. 13, 1790; *Jay*, III, 404, gives the last two words as "unfledged thought"; letter of Jay to Hamilton, Nov. 28, 1790.

Jay replied in cool and restrained language that he considered it inadvisable to take any action. "Having no apprehension of such measures, what was to be done appeared to me to be a question of some difficulty as well as importance; to treat them as very important might render them more so than I think they are. . . . The assumption will do its own work; it will justify itself and not want advocates. Every indecent interference of State Assemblies will diminish their influence; the National Government has only to do what is right, and, if possible, be silent. If compelled to speak, it should be in few words, strongly evinced of temper, dignity and self-respect."

The next Term of the Court was held in Philadelphia in February, 1791, at the new City Hall which stood east of Independence Hall.[1] Again the docket presented no cases for argument; but the session was enlivened by a singular episode in connection with the large number of lawyers who presented themselves for admission to practice. The local Bar had apparently assumed that, since Judge Wilson himself was a Philadelphia lawyer and knew them all personally, no insistence would be made by the Court upon the production of certificates of character. To the surprise, mortification and anger of many of the learned

[1] In the *Gazette of the United States*, Feb. 4, 1792, it is said that the Court "will meet at the new Court-House in this city." Of these halls, an interesting contemporary description was given by an English traveler. "The State House is appropriated to the use of the legislative bodies of that State. Attached to this edifice are the Congress and the City Halls. In the former, the Congress of the United States meet to transact business. The room allotted to the representatives of the lower house is about sixty feet in length and fitted up in the plainest manner. At one end of it is a gallery, open to every person that chuses to enter it; the staircase leading to which runs directly from the public street. The Senate Chamber is in the story above this, and it is furnished and fitted up in a much superior style to that of the Lower House. In the city hall, the Courts of Justice are held, the Supreme Court of the United States, as well as that of the State of Pennsylvania and those of the city." *Travels through the States of North America during the Years 1795, 1796, and 1797* (1807), by Isaac Weld, Jr.

counselors, Judge Wilson was unwilling to vouch for them; and the Chief Justice stated that the Court had decided not to accept the voucher of one lawyer for another. The flurry which ensued was vividly depicted in a letter written at the time.[1] "The Supreme Court of the United States opened on Monday, the 7th inst., in which Chief Justice Jay and Judges Cushing, Wilson, and Iredell sat. A number of the Gentlemen of the Bar of this City attended at their lodgings and escorted them to the State House. The Court opened but there was no business. The Gentlemen of the Bar applied for admission but a Rule of the Court stood in their way, which made it necessary, previously to their admission, that they had practiced in the Supreme Court of the State three years, and that they had good moral characters, and possessed good legal abilities. I obviated the first objection by my Certificate of their Admission in the Supreme Court. The Court took then as evidence of the latter qualities that Mr. Wilcocks was Recorder of the City; Mr. Bradford was Attorney General of the State; Mr. Lewis was Attorney for the District; Mr. Fisher was vouched for by Mr. (Justice) Wilson, with apparent reluctance as against his wishes to do it for anyone; Mr. Sergeant proposed that as Mr. Fisher was admitted, he should vouch for the rest of the Bar, but the Chief Justice said that they had determined that one lawyer should not vouch for another. However, he remarked that Mr. Sergeant had been Attorney General, which was an evidence of his good character and legal ability, and therefore he was admitted. Mr. Ingersoll was then proposed, and Mr. Randolph stated to the Court that he had been

[1] See letter of Edward Burd to Jasper Yeates, Feb. 8, 1791, in *Amer. Law Rev.* (1900), XXXIV, 628, quoted in a letter from Francis Rawle.

a Member of Congress and of the Federal Convention. Chief Justice Jay observed that he might be a very good Member of Congress and yet no lawyer. Mr. Ingersoll then formally withdrew his application for admission till another period. After a little while, Mr. Wilson said that it was from no difficulty about either that Gentleman's character or legal ability, for everybody knew that if he said anything about him, he must have said that he was one of the most eminent at the Bar. He was admitted without any renewal of his application, and Mr. Jay also paid him some compliments. So many difficulties occurring, the rest of the Bar declined bringing forward their applications, having expected that from Mr. Wilson's knowledge of them, everything might have been made easy. The Court then adjourned till one o'clock, when, the proper certificates having been provided, all who applied were admitted. The Bar thought they might have been treated with a little more delicacy by a Gentleman who knew them all intimately. However, I do not think that he meant any offence to them, but merely adopted the Rule of discriminating between the deserving and undeserving of the profession. It seems he might have acted with more fortitude if he had declared his good opinion of some and called for certificates only as to such whom he did not know particularly; or if he had positively refused to declare his opinion respecting any of the profession without written evidence." Among those admitted at this time who were then, or afterwards became, eminent leaders of the Bar, were William Lewis, William Bradford, Jr., Alexander Wilcocks, Miers Fisher, Jonathan Dickinson Sergeant, Jared Ingersoll, Edward Tilghman, William Rawle, Alexander J. Dallas, Peter S. Duponceau, Benjamin Chew, Moses Levy, Thomas Leaming, Jr., and Jasper

Moylan, all of Pennsylvania; James Monroe of Virginia; Samuel Johnston of North Carolina, and Luther Martin of Maryland.[1]

At the August Term in 1791, Samuel Bayard was appointed Clerk in place of Tucker, and five counselors were qualified.[2] On the second day of the Term, the case of *West* v. *Barnes*, 2 Dallas, 401, was called for argument; but "David L. Barnes of Massachusetts, one of the defendants in error and counselor of the Court (just admitted) rose and stated to the Court that the proceedings in the above cause could not be properly before the Court", the writ of error having issued from the office of the Clerk of the Circuit Court and not from the office of the Clerk of the Supreme Court.[3] The Court dismissed the case on this ground. Had the case been argued, it is probable that at that very early date the Court would have been called upon to consider the extent of its powers, relative to the constitutionality of State statutes; for the legal tender paper money law of Rhode Island was involved in the case — the same law which the Judges of that State had held invalid in *Trevett* v. *Weeden* in 1786.[4]

Before the next Term, it became necessary for the President to fill a second vacancy; for John Rutledge of South Carolina, who had never attended a session of the Court and had only served on Circuit, now

[1] Twenty-two counselors and one attorney were qualified from Pennsylvania; one counselor from Maryland; one counselor and one attorney from Virginia; one counselor from North Carolina.

[2] David Leonard Barnes of Massachusetts; and Charles Swift, Thomas Smith, Jacob R. Howell, John D. Coxe of Pennsylvania. *Freeman's Journal*, Aug. 3, 1791, said that the Court adjourned after "several motions respecting suits depending on the Court were made."

[3] See accounts of this case in the contemporary newspapers, *Dunlap's American Daily Advertiser*, Aug. 13, 1791; *Columbian Centinel*, Aug. 13, 1791; *Massachusetts Spy*, Aug. 25, 1791, which are fuller than the account given in *Dallas Reports*.

[4] See case of *David L. Barnes et al.* v. *William West et al.*, in original files of the Circuit Court in the United States District Court at Providence, R. I.

resigned to accept the position of Chief Justice of his State. Although there was a distinguished Judge of the United States District Court in Georgia, Nathaniel Pendleton, who was an active candidate for the promotion to the Supreme Court and who was warmly indorsed by the veteran Edmund Pendleton of Virginia, a close personal friend of Washington, the President determined to make the appointment from South Carolina.[1] Accordingly, he adopted the singular expedient of addressing a letter jointly to Charles Cotesworth Pinckney and to Edward Rutledge (both of that State), asking if either of them would accept the position. Upon receipt of a reply from both stating that they thought that they could be of more service to the General Government and to their State by remaining in the State Legislature, Washington, on October 31, 1791, appointed Thomas Johnson, a former Governor of Maryland, and then Judge of the United States District Court. As Johnson was fifty-nine years of age — the oldest man on this first Court — he only consented to accept, after assurances from Chief Justice Jay and from the President that the Circuit Court system requiring arduous labor and long traveling by the Judges would probably be altered by the next Congress.[2]

At the February Term in 1792, there was still no case ready for argument, and the Court adjourned, after hearing a motion in *Oswald* v. *State of New York* to compel an appearance on the part of the State.

While it thus appears that during these first three years of its existence the Court had practically no business to transact, its Judges found themselves

[1] See letters of March 5, July 13, 1791; *Calendar of Applications* (1901), by Gaillard Hunt.

[2] *Washington*, X, letters of May 24, Aug. 7, 1791. Johnson had been given a recess appointment, Aug. 5, 1791; he was confirmed by the Senate, Nov. 7.

fully employed on the other arduous duties required of them under the Judiciary Act. By the provisions of that statute, the country had been divided into three Circuits (the Eastern, Middle, and Southern), to each of which two Supreme Court Judges were permanently assigned and directed to hold Court twice a year in each District, in company with the District Judges. The framers of the Act had expected this function of the Judges to be of great value in keeping the Federal Judiciary in touch with the local communities; and at the very outset of the Court's organization, Washington had written to the Chief Justice and to each of the Judges, expressing his views of the high importance of the manner of the performance of their duties and saying that he had "always been persuaded that the stability and success of the National Government, and consequently the happiness of the people of the United States, would depend in a considerable degree on the interpretation and execution of its laws. In my opinion, therefore, it is important that the Judiciary system should not only be independent in its operations, but as perfect as possible in its formation. As you are about to commence your first Circuit, and many things may occur in such an unexplored field which it would be useful should be known, I think it proper to acquaint you, that it will be agreeable to me to receive such information and remarks on this subject, as you shall from time to time judge expedient to communicate."[1] It was, in fact, almost entirely through their contact with the Judges sitting in these Circuit Courts that the people of the country became acquainted with this new institution, the Federal Judiciary; and it was largely through the charges to the Grand Jury made by these Judges that the funda-

[1] *Washington*, X, letter of April 3, 1790.

mental principles of the new Constitution and Government and the provisions of the Federal statutes and definition of the new Federal criminal legislation became known to the people. As was said by a contemporary newspaper: "Among the more vigorous production of the American pen, may be enumerated the various charges delivered by the Judges of the United States at the opening of their respective Courts. In these useful addresses to the jury, we not only discern sound legal information conveyed in a style at once popular and condensed, but much political and constitutional knowledge. The Chief Justice of the United States has the high power of giving men much and most essential information in a style the very model of clearness and dignity."[1] No better exposition

[1] *Farmer's Weekly Museum* (Walpole, N. H.), June 17, 1799.

The Circuit Court for the District of Connecticut was opened at New Haven, Thursday, April 23, 1790, by Jay, Cushing, and District Judge Richard Law: "His Honor the Chief Justice delivered an eloquent and pertinent charge. . . . The session continued until Saturday during which the several civil causes were heard and sundry rules and regulations adopted for future proceedings. The good sense and candor of the Judges has left an impression on the minds of the public, favorable to this new institution." *Literary Diary of Ezra Stiles* (1901), III; *Gazette of the United States*, May 5, 1790. At the October session of the Circuit Court in Connecticut in 1790, the Chief Justice in his charge to the Grand Jury "made many pointed remarks on the nature of certain offences and the duty of the Grand Jury and delivered the whole with elegant simplicity and precision", *Connecticut Courant*, Oct. 25, 1790.

The opening of the Circuit Court in Massachusetts was described in the *Boston Gazette*, May 10, 1790, as follows: "Monday last agreeably to law a Circuit Court of the United States for the Massachusetts District was held before Chief Justice Jay, Judge Cushing and Judge Lowell. After the usual forms were gone through and the Grand Jury impannelled, a charge was given them by the Chief Justice and the Throne of Grace addressed in Prayer by the Rev. Dr. Howard — the following gentlemen were admitted Counsellors, etc. Tuesday, the Grand Jury came into Court and presented one indictment after which they were dismissed by the Chief Justice. The cause, *Nebon* v. *De Baury*, was discontinued by the plaintiff in order to bring it before the chancellate of the Consul, agreeably to the Convention agreed on between France and the United States and recently promulgated. The criminal cause was continued to the next session on the plea of the defendant that very essential evidences were absent"; see also *Columbian Centinel*, May 5, 1790, and *Independent Chronicle*, May 27, 1790, giving the charge of Chief Justice Jay in full; see "elegant charge" of Judge Iredell at Boston, *Independent Chronicle*, Oct. 28, 1791; charge of Chief Justice Jay in Massachusetts "replete with his usual perspicuity and elegance", *Columbian Centinel*, May 6,

of the basic principles can be found than in the memorable charge of Chief Justice Jay at the first of these Circuit Courts, held in New York on April 4, 1790: "It cannot be too strongly impressed on the minds of all how greatly our individual prosperity depends on our National prosperity, and how greatly our National prosperity depends on a well-organized, vigorous government, ruling by wise and equal laws, faithfully executed. Nor is such a government unfriendly to liberty — that liberty which is really estimable. On the contrary, nothing but a strong government of laws, irresistibly bearing down arbitrary power and licentiousness, can defend it against those two formidable enemies. Let it be remembered that civil liberty consists, not in a right to every man to do just what he pleases, but it consists in an equal right to all citizens to have, enjoy and do, in peace, security and without molestation, whatever the equal and constitutional laws of the country admit to be consistent with the public good." He pointed out that it was universally agreed that it was "of the last importance to a free people that they who are vested with Executive, Legislative and Judicial powers should rest satisfied

1792. The first Circuit Court in Rhode Island after its admission to the Union was described in the *Columbian Centinel*, Dec. 22, 1790, and the Chief Justice's charge was termed "full of good sense and learning though expressed in the most plain and familiar style. . . . At length have the mild beams of national Justice begun to irradiate the State and opened a dawn of hope for better times"; see also Jay's "excellent charge" in Rhode Island, *Massachusetts Spy*, Dec. 15, 1791; charge of Jay in Vermont, *Columbian Centinel*, July 28, 1792. On Sept. 27, 1792, at a Circuit Court in Connecticut held by Judges Wilson and Iredell, Wilson "addressed an elegant and pertinent charge to the Grand Jury in which he expatiated with great force and beauty of language upon the excellence of the institution of juries", *Connecticut Journal*, Oct. 3, 1792; *American Daily Advertiser*, May 15, 1792; charge of Judge Wilson at Providence, R. I., "replete with the purest principles of our equal government and highly indicative of his legal reputation", *Providence Gazette*, April 25, 1793; see also charges of Judge Wilson in full at Philadelphia, defining the Federal crimes, *Pennsylvania Gazette*, April 14, 1790; *Columbian Centinel*, May 1, 1790; *Massachusetts Spy*, Sept. 8, 1791; *American Daily Advertiser*, Feb. 5, 6, 9, 1793; charge of Chief Justice Ellsworth at Savannah, Ga., *Connecticut Journal*, May 25, 1796.

with their respective portions of power and neither encroach on the provinces of each other, nor suffer themselves *nor the others* to intermeddle with the rights reserved by the Constitution to the people." [1] His explanation of the necessity of a Federal Judiciary was particularly illuminating. "We had become a Nation. As such we were responsible to others for the observance of the Laws of Nations; and as our National concerns were to be regulated by National laws, National tribunals became necessary for the interpretation and execution of them. No tribunals of the like kind and extent had heretofore existed in this country. From such, therefore, no light of experience nor facilities of usage and habit were to be derived. Our jurisprudence varied in almost every State, and was accommodated to local, not general convenience, to partial, not National policy. This convenience and this policy were nevertheless to be regarded and tenderly treated. A judicial controul, general and final, was indispensable. The manner of establishing it with powers neither too extensive nor too limited rendering it properly independent and yet properly amenable involved questions of no little intricacy. The expedience of carrying justice, as it were, to every man's door was obvious; but how to do it in an expedient manner was far from being apparent. To provide against discord between National and State jurisdiction, to render them auxiliary instead of hostile to each other, and so to connect both as to leave each sufficiently independent and yet sufficiently combined was and will be arduous. Institutions formed under such circumstances should therefore be received with candour and tried with temper and prudence."

[1] *Columbian Centinel*, May 29, 1790; this charge was repeated in all the Districts of the Eastern Circuit; see also *Jay*, III, 387.

For the first two years of the new Government, there was naturally little business to be transacted in any of the Circuit Courts, and the situation was described by the newspapers in 1791 as follows: "In the Judicial Department as much has been done as circumstances would admit. Judges of eminent virtue and learning preside in the Federal Courts. But the very narrow judicial power of the United States renders this one of the most difficult branches of legislation. Courts must be established and provision made to administer justice to men, almost at home, and yet the business is very inconsiderable. This is not the fault of Congress. If anything is to be regretted it is that a different arrangement had not been made of the judicial power of the Constitution."[1] The Judges, nevertheless, made a very favorable impression upon the local communities in which they sat, and even in Rhode Island, which had been the last State to adopt the Constitution, it was said, in 1791, that "the Court in the conduct of the business and in their decisions gave great satisfaction. Their candour, impartiality and discernment were universally acknowledged and applauded. Justice itself seemed to preside on the Bench and inspire it." [2]

But while the number of cases in the Circuit Courts was scanty, the subjects involved were of high importance and presented legal questions of the most delicate nature with respect to the limitations on State sovereignty. Most of the opposition of the Anti-Federalists to the Constitution had been based on fears lest the proposed Federal Government should control

[1] See *Providence Gazette*, April 2, 1791, quoting *Gazette of the United States*.

[2] *Massachusetts Spy*, July 14, 1791. "The Chief Justice hath delighted the people of Mass. They regret that Boston was not the place of his nativity and his manner they consider so perfect as to believe that New York stole him from New England," wrote Gore to King, May 15, 1790. *King*, I.

the States in respect to their stay laws, their legal tender laws, their legislation as to British debts and loyalist properties and their State land grants and land titles.[1] After the adoption of the Constitution, the probable encroachment of the Federal Courts and extension of their powers had been apprehended as a certain cause of friction between the Federal Government and the States; and five days after the enactment of the Judiciary Act in 1789, William Grayson of Virginia had written to Patrick Henry that "whenever the Federal Judiciary comes into operation, I think the pride of the States will take alarm." As early as 1791, Congress had debated a resolve for a Constitutional Amendment abolishing the whole system of Federal Courts as distinct from the State tribunals;[2] and in December, 1791, Attorney-General Randolph had suggested to the President that the United States Attorneys should be required to present to the Attorney-General, a general statement of cases in which the "harmony of the two Judiciaries may be hazarded, and to communicate to him those topics on which the subjects of foreign nations may complain in the administration of justice."[3] As an interesting example of the confusion attendant upon the initiation of the new judicial system, the Federal Circuit Court in North Carolina actually removed by certiorari a case which had been pending in a State Court prior to the adoption of the Constitution, an attempt which was clearly unwarranted. "The Supreme Judges of the State

[1] In the controversies between New York and Vermont over the admission of Vermont into the Union as a new and separate State, one of the chief obstacles was "the demand on the part of Vermont to be secured against certain claims for lands which it seems they are apprehensive would be wrested from them through the means of the Federal Courts." *New York Daily Advertiser*, Feb. 16, 1790; *Massachusetts Spy*, March 4, 1790; and see *infra*, ch. 2.

[2] *Freeman's Journal*, March 9, 16, 1791; *Connecticut Courant*, March 21, 1791; *Providence Gazette*, April 2, 1791.

[3] *Amer. State Papers, Misc.*, I, No. 25, letter of Dec. 28, 1791.

refused to obey, and the marshal did not execute his precept," wrote Fisher Ames, describing the episode. "The State Judges, knowing the angry state of the Assembly, wrote a letter of complaint representing the affair. Whether the United States Judges have kept within legal bounds is doubted. I should be sorry for an error of so serious a kind, and under such unlucky circumstances." [1] As early as 1792, many men in all parts of the country believed that State jealousies were certain to destroy the new Government. A Virginia correspondent wrote to Alexander Hamilton: "The operation of the Government has by no means been pleasing to the people of this country. On the contrary, the friends to it are daily decreasing. Some of the highest in rank and ability among us and who supported it in our convention are now extremely dissatisfied and loud in abusing its measures; while some others of equal fame only express their chagrin and disappointment in private." Theodore Sedgwick of Massachusetts wrote: "I fear the National Government has seen its best days. The distance at which it stands removed from the affections of the great bulk of the people; the opposition of so many great, proud and jealous sovereignties; the undistinguished, perhaps indistinguishable, boundary between National

[1] *Works of Fisher Ames* (1854), I, letter of Jan. 6, 1791. Reference to this episode was made by Nathaniel Macon of North Carolina in a speech in the House of Representatives in 1802: "We have heard much about the Judges and the necessity of their independence. Soon after the establishment of the Federal Court, they issued a writ . . . to the Supreme Court of North Carolina, directing a case then pending in the State Court to be brought into the Federal Court. The State Judges refused to obey the summons and laid the whole proceedings before the Legislature, who approved their conduct." *7th Cong., 1st Sess.*, 711.

John Sitgreaves wrote to Judge Iredell, Aug. 2, 1791: "With respect to the certiorari, Mr. Hamilton informed Judge Blair and myself that Mr. [Robert] Morris has desired him not to urge it further; that as he was a Member of the Legislature of the United States, from motives of delicacy, he would rather the cause should be proceeded on in the State Courts. If this should be done, I suppose the question, so far as it relates to the authority of the Courts will be suffered to sleep." *Iredell*, II, 333.

and State jurisdictions; the disposition which both may possess to encroach; and above all, the rancorous jealousy that began with the infancy of the Government and grows with its growth, arising from an opposition, or supposed opposition of interests — produce in my mind serious doubts whether the machine will not soon have some of its wheels so disordered as to be incapable of regular progress."[1] Such pessimism was soon seen to be unwarranted; and the new Federal Judiciary soon obtained the confidence of the people. Nothing shows this clearer than the singular fact (hitherto unnoted by legal historians) that within two years from the beginning of the new Government, the United States Circuit Courts exercised, without any apparent contemporary criticism, that power of holding State statutes invalid, which later so frequently aroused State hostility. The first instance of this assertion of the supremacy of the Federal Government occurred as early as May, 1791. It presented, as the newspapers stated, "the great and much litigated question whether obligations in favor of real British subjects or those who had joined the armies of Great Britain during the war, should draw

[1] *Hamilton Papers MSS*, letter of William Heth of Richmond, June 28, 1792; *Memoirs of Theophilus Parsons* (1859), by Theophilus Parsons, letter of Jan. 16, 1792. Hamilton wrote to John Adams, Aug. 16, 1792: "Your confirmation of the good disposition of New England is a source of satisfaction. I have a letter from a well informed friend in Virginia who says, all the persons I converse with acknowledge that the people are prosperous and happy, and yet more of them, including even the friends of the Government, appear to be alarmed at a supposed system of policy tending to subvert the Republican government of this country — were ever men more ingenious to torment themselves with phantoms?"

The pessimism was not entirely due to political causes. Financial troubles were rife. John Brown, a Kentucky Representative, wrote from Philadelphia, April 20, 1792: "Failures are daily taking place in this city and New York — the latter place in a state of distress and confusion beyond description; confidence between man and man is totally lost, business suspected, and mobs and insurrections hourly apprehended. . . . 'Tis impossible to say when the calamity will stop or what the effects of it will be. Certain it is that nothing like it was ever seen before in this country." *Harry Innes Papers MSS.*

interest during the time the creditors were inaccessible by reason of the war. In this case, the Court adjudged that the statute law of Connecticut enabling the State Courts to add interest in such cases was an infringement of the treaty of peace, and that upon common law principles interest was recoverable. The learned and ingenious arguments from the bench on this question were highly interesting and gave general satisfaction." [1] Thus, less than two years after the adoption of the Constitution, and five years before the Court decided the point in the noted case of *Ware* v. *Hylton*, the Judges of the Court on Circuit exercised the function of declaring invalid a State law which infringed upon the provisions of a treaty.

Only a year later, the Federal Judiciary again asserted the supremacy of the Federal Government by holding a State statute invalid as in conflict with the Federal Constitution, when in June, 1792, Chief

[1] *Connecticut Courant*, May 9, 1791; *New Jersey Journal*, May 11, 1791; *Providence Gazette*, May 14, 1791; *New York Journal*, May 7, 1791; *Freeman's Journal*, May 16, 1791; *Massachusetts Spy*, May 12, 1791.

The Connecticut Courant, May 9, 1791, referred to the decision as "much lamented by those who wish to defraud their creditors", and to the State statute as having "received its death wound by the adoption of the new Constitution, and hath languished in extreme agony ever since. On Thursday, the 28th inst, the two-edged sword of justice gave its last fatal stroke and it expired without a groan. Numerous spectators beheld its corpse without a smile and hoped that it might never rise again in this world to our shame or in the world to come to our confusion."

A similar decision was given by Judge Iredell in 1792 at a Circuit Court in Savannah, Ga., in the case of *Samuel Brailsford* v. *James Spalding*, holding the British Treaty "had the effect of an express repeal of that part of the State act which created an impediment to recovery of British debts sequestrated"; *Gazette of the United States*, May 16, 1792; *New York Daily Advertiser*, May 17, 1792; *United States Chronicle*, May 31, 1792; a similar decision was made by Judge Paterson at a Circuit Court in South Carolina in 1793, in the case of *Higginson* v. *Greenwood; The Diary or Loudun's Register* (N. Y.), June 7, 1793. See *Amer. State Papers, For. Rel.*, I, letter of Jefferson to Hammond, May 9, 1792, as to British debt cases.

Rufus King wrote to Gouverneur Morris, Sept. 1, 1792: "The National Judiciary, without having been much employed, has been the means of settling a large proportion of our foreign debts. From the Potomack, East, nothing remains to be settled. In South Carolina, where immense sums were due, they are doing well and, in a few years, will be in a very prosperous condition. Virginia will be the last to do what her own interests required her long since to have performed." *King*, I.

Justice Jay, Judge Cushing, and District Judge Henry Marchant, sitting in the Circuit Court for the District of Rhode Island, held a law of that State to be unconstitutional as impairing the obligation of contract, in the case of *Alexander Champion and Thomas Dickason* v. *Silas Casey*.[1] The statute involved was an Act of the Rhode Island General Assembly passed in February, 1791, in response to a petition of a debtor for an extension of three years' time in which to settle his accounts with his creditors and for an exemption from all arrests and attachments for such term of three years. The decision was as follows: "The Court also determined in the case of Champion and Dickason against Silas Casey that the Legislature of a State have no right to make a law to exempt an individual from arrests and his estate from attachments for his private debts, for any term of time, it being clearly a law impairing the obligation of contracts, and therefore contrary to the Constitution of the United States." Another newspaper stated that: "The defendant's counsel pleaded a resolution of the State in bar of the action, by which he was allowed three years to pay his debts and during which he was to be free from arrests on that account. The Judges were unanimously of opinion that, as by the Constitution of the United States, the individual States are prohibited from making laws which shall impair the obligation of contracts, and as the resolution in question, if operative, would impair the obligation of the contract in question, therefore it could not be admitted to bar the action."[2] Though this decision was given

[1] This case has hitherto escaped the notice of legal historians; the original records are now on file in the United States District Court for the District of Rhode Island.

[2] For these reports of the decision, see *Columbian Centinel*, June 20, 1792; *Providence Gazette*, June 16, 1792; *United States Chronicle* (Prov.), June 14, 1792; *Salem*

great publicity in newspapers throughout the States, it seems to have aroused no opposition to the Federal Courts; and though, thirty years later, the right of these Courts to declare a State statute to be invalid was hotly attacked by many States, the exercise of this right in 1792 was accepted without protest by the very State which, five years before, had sought to impeach its State Judges for holding a State law invalid;[1] and its acquiescence was expressed formally (as described by contemporary papers) as follows: "In conformity to a decision of the Circuit Court, the Lower House of Assembly voted on Wednesday that they would not grant to any individual an exemption from arrests and attachments for his private debts, for any term of time."[2] Following this decision in *Champion* v. *Casey* holding a Rhode Island State law unconstitutional, the Federal Circuit Courts proceeded to exercise this judicial power in a series of cases involving statutes of other States; in 1793, the validity of a Connecticut statute was involved in a case;[3]

Gazette (Mass.), June 26, 1792; *New York Daily Advertiser*, June 22, 1792; *Connecticut Journal*, June 22, 1792, and many other newspapers.

One month before this decision, the Federal Circuit Court sitting in Pennsylvania (Judges Wilson, Blair, and District Judge Peters) had decided a case involving the validity of a statute of that State; but had held it not violative of the Federal Constitution. See *Collet* v. *Collet*, 2 Dallas, 294; *Gazette of the United States*, May 2, 1792; *New York Daily Advertiser*, May 2, 1792.

[1] In 1786, when the Judges of the Supreme Court of Rhode Island held a legal tender paper money statute unconstitutional in *Trevett* v. *Weeden*, the Rhode Island Legislature attempted to impeach the Judges; but the requisite vote was not secured. Five years later, in 1791, after the adoption of the Federal Constitution, the Legislature actually acquiesced in judicial action holding the legal tender statute invalid; and (as stated in the newspapers), a decision having been given by a State Court "on the principle that by the adoption of the Constitution that act was virtually repealed, a petition was therefore presented for the interposition of the Legislature; but as the House of Representatives refused to receive the petition, it must be inferred as the sense of the Legislature that the Act was superseded by the adoption of the Constitution and that it has thereby become null and void." *Providence Gazette*, July 9, 1791.

[2] *Providence Gazette*, June 23, 1792.

[3] *Connecticut Courant*, Oct. 7, 1793. "The cause, which involves the question whether a protection granted by the Legislature of the State . . . (which protection was to continue no longer than during the session) was valid and sufficient

in 1795, a statute of Pennsylvania was held invalid by Judge Paterson in *VanHorne's Lessee* v. *Dorrance*, 2 Dallas, 304;[1] in 1799, a statute of Vermont was held invalid as violating the impairment of obligation of contract clause of the Federal Constitution.[2] So far as can be ascertained from the comments in the press and from other contemporary documents, the action of the Federal Courts in these cases met with no opposition, and no claim was ever then advanced that their action was without constitutional authority.[3]

Even more notable, however, in the history of American law was the very early exercise of another form of judicial power by the Federal Circuit Courts, when, three years from their establishment, they rendered a decision for the first time holding an Act of Congress to be in violation of the Constitution.

to protect his person from an arrest by process or execution from the Courts of the United States, was fully debated upon demurrer, but is continued. . . . This cause involves consequences of immense magnitude, and we trust will not be decided without full deliberation." This case has not hitherto been noted.

[1] This case has always been cited hitherto by legal historians (though erroneously) as the first instance of a decision by a Federal Court on the validity of a State statute. See *Aurora*, May 15, 1795, *New York Daily Advertiser*, May 16, 1795, *Connecticut Journal*, May 27, 1795, for interesting facts concerning the case; see also a pamphlet published in Lancaster, Pa., in 1801, by William Hamilton, entitled *Connecticut Claim* (*Pickering Papers MSS*, L, LVII). A writ of error was taken from this decision of the Circuit Court to the United States Supreme Court, but five years later, it was dismissed for failure to prosecute.

[2] This case, hitherto unnoted by legal historians, is described in *Farmer's Weekly Museum*, April 29, 1799, as one which "was lately brought to trial before the Circuit Court of the United States at Rutland, Vermont, the Church Land Cause, brought by the selectmen of Manchester, by virtue of a statute of that State authorizing the selectmen of each town to take possession of all church lands, and to appropriate the avails to other purposes than originally intended. The Court, after a fair, impartial examination of the merits of the cause, adjudged the statutes to be *unconstitutional* and that the Church should hold their lands."

[3] The only criticism of any of the decisions was that voiced by certain Federalists against Judge Paterson (himself a Federalist) owing to his decision in *Van Horne* v. *Dorrance;* it was based purely on political and personal grounds, and arose out of the fact that the decision had resulted in damage to large numbers of Connecticut Federalist settlers on lands in Pennsylvania; see *Georgia Republican*, Feb. 14, 1803. In *Aurora*, Sept. 20, 28, 1803, it is said that Judge Paterson's decision lost him the appointment as Chief Justice in 1801, owing to opposition by certain prominent Federalists.

By the Act of March 23, 1792, it was provided that the Circuit Courts should pass upon certain claims of invalid pensioners, subject to revision by the Secretary of War and by Congress. When the first case under this Act arose in the Federal Circuit Court sitting in New York, April 5, 1792, Chief Justice Jay and Judge Cushing, after stating that, under the Constitution, the Government was divided into three "distinct and independent branches, and that it is the duty of each to abstain from and to oppose encroachment on either, that neither the Legislative nor the Executive branch can constitutionally assign to the Judicial any duties but such as are properly judicial, and to be performed in a judicial manner", decided to construe the Act as appointing the Judges as Commissioners to perform non-judicial duties, with power to accept or decline the office; and, out of desire to show high respect for Congress, they professed willingness to act as such Commissioners.[1] These views the Judges communicated to Congress by means of a letter addressed to the President, April 10, 1792. Judge Iredell, sitting in the Southern Circuit, also wrote to President Washington that in his view the Act was unconstitutional, and he expressed a doubt as to whether he would be justified in acting even as a Commissioner. Judges Wilson and Blair, however,

[1] That the subject matter of the statute was such as to enlist popular sympathy, and therefore to bring possible odium on the Judges for failing to act under the statute, may be seen from an editorial in the *National Gazette*, April 12, 1792: "Our poor, starving invalids have at length some provision made for them by Congress; and as the distresses of many of them are urgent in the extreme, it is to be hoped that not a moment's delay will be made by the public officers who are directed to settle their accounts; for although men who are accustomed to plentiful tables do not perhaps know it, it is nevertheless a melancholy truth that a few days fasting would kill not only a feeble, war-worn veteran, but even a hearty well-fed member of Congress or head of a department. If through unavoidable delay any of those unfortunate men should starve before their pittance is paid, then it is to be hoped their widows and orphans will on the very first application receive it, that they may at least have something to purchase coffins for the deceased."

sitting in the Circuit Court in Pennsylvania, met the question boldly, and (without filing any further written opinion) entered an order in the case of an invalid claimant named Hayburn that: "it is considered by the Court that the same be not proceeded upon." [1] Following the decision, they addressed a letter to the President, setting forth "the sentiments which, on a late painful occasion, governed us with regard to an Act passed by the Legislature of the Union." They stated that "it is a principle important to freedom that, in government, the Judicial should be distinct from, and independent of, the Legislative department", and they held that the business directed by the Act was not of a judicial nature. "These, Sir, are the reasons of our conduct. Be assured that, though it became necessary, it was far from being pleasant. To be obliged to act contrary, either to the obvious direction of Congress, or to a constitutional principle, in our judgment equally obvious, excited feelings in us, which we hope never to experience again." [2] This action of the Federal Judges, holding for the first time an Act of Congress to be in conflict with the Constitution, at once became the subject of consideration in Congress. On a memorial presented by Hayburn, April 13, 1792, asking for relief, the following statement was made in the House of Representatives, setting forth more in detail the view of the Judges: [3]

[1] See the *First Hayburn Case*, by Max Farrand, *Amer. Hist. Rev.* (1907), XIII. Judge Peters, who also sat in this case, wrote, June 23, 1818, to Charles J. Ingersoll relative to a later pension act: "Having been among the first Judges who resisted the danger of Executive control over the judgments of Courts when the first Invalid Law gave power to the Secretary of War to review such judgments, I am confirmed in the opinions I then held by the circumstances now occurring; tho' I do not now act as a Judge *in a Court*." *Peters Papers MSS.*

[2] For this letter of April 18, 1792, and that of Judge Iredell of June 8, 1792, see 2 Dallas, 410, note; *Amer. State Papers, Misc.*, No. 31.

[3] See report in *American Daily Advertiser*, April 16, 1792; see also *2d Cong., 1st Sess.*, 556–557.

It appeared that the Court thought the examination of invalids a very extraordinary duty to be imposed on the Judges — and looked on the law which imposed that duty as an unconstitutional one; inasmuch as it directs the Secretary of War to state the mistakes of the Judge to Congress for their revision; they could not, therefore, accede to a regulation tending to render the Judiciary subject to the Legislative and Executive powers, which, from a regard for liberty and the Constitution, ought to be kept carefully distinct, it being a primary principle of the utmost importance that no decision of the Judiciary Department should under any pretext be brought in revision before either the Legislative or Executive Departments of the government, neither of which have, in any instance, a revisionary authority over the judicial proceedings of the Courts of Justice. . . . This being the first instance in which a Court of Justice had declared a law of Congress to be unconstitutional, the novelty of the case produced a variety of opinions with respect to the measures to be taken on the occasion. At length a Committee of five were appointed to enquire into the facts contained in the Memorial and to report thereon.

A singular suggestion made by one Congressman that a law be passed "to point out some regular mode in which the Judges shall give official notice of their refusal to act under any law of Congress on the ground of unconstitutionality", would seem to have been a complete and early recognition in Congress that the Judges would continue to exercise this power.

The decision evidently caused considerable excitement not only in Congress but in the community; and while, fifteen years later, it was the Anti-Federalists who assailed this form of exercise of judicial power, the curious fact should be noted that, at this time, the Federalists were apparently the opponents and the Anti-Federalists the upholders of the Judiciary. Thus, Freneau's *National Gazette*, a violent opponent of Federalism, applauded the decision of the Judges

and expressed the hope that they might hold unconstitutional other Federal legislation:

A correspondent remarks that the late decision of the Judges of the United States in the Circuit Court of Pennsylvania, declaring an act of the present session of Congress, unconstitutional, must be matter of high gratification to every republican and friend of liberty; since it assures the people of ample protection to their constitutional rights and privileges against any attempt of Legislative or Executive oppression. And whilst we view the exercise of this noble prerogative of the Judges in the hands of such able, wise and independent men as compose the present Judiciary of the United States, it affords a just hope that not only future encroachments will be prevented, but also that any existing law of Congress which may be supposed to trench upon the constitutional rights of individuals or of States, will, at convenient seasons, undergo a revision; particularly that for establishing a National Bank; which being an incorporation and exclusive charter of privileges, violative, as it is conceived, of the independent rights and sovereignty of the States, is deemed by many of the enlightened citizens of America to be repugnant to the spirit, meaning and letter of the Constitution, and is regarded as a mere State engine of ministerial contrivance, on the pretence to aid fiscal operations, but in reality, to introduce placemen, pensioners, corruption, venality and intrigue into Congress; of the happy effects of which let those who see, speak.

The *General Advertiser*, owned in Philadelphia by Benjamin F. Bache and strongly hostile to the Federal Party, said:

Never was the word "impeachment" so hackneyed, as it has been since the spirited sentence passed by our Judges on an unconstitutional law. The high-fliers in and out of Congress, and the very humblest of their humble retainers, talk of nothing but impeachment! impeachment! impeachment! As if, forsooth, Congress were wrapped up in the cloak of the infallibility which has been torn from the shoulders of the Pope; and that it was damnable heresy

and sacrilege to doubt the constitutional orthodoxy of any decision of theirs, once written on calf skin. But if a Secretary of War can suspend or reverse the decision of the Circuit Judges, why not a drill Sergeant or a black drummer reverse the decision of a jury? Why not abolish at once all our Courts except the Court-martial? and burn all our laws except the Articles of War? . . . But when those impeachment mongers are asked how any law is to be declared unconstitutional, they tell us that nothing less than a general convention is adequate to pass sentence on it — as if a general convention could be assembled with as much ease as a committee of stock jobbers.

These articles were widely quoted, apparently with approval, by other Anti-Federalist papers.[1] An interesting letter signed "Camden" opposing the action of the Judges and commenting on their "extraordinary conduct" was published in some of the papers:

If the word impeachment has been hackneyed *out* of Congress, it only indicates the sense of the public on the refusal of public servants to execute duties imposed on them by law; that the word has been hackneyed *in* Congress is not true; no individuals of that body, it is hoped, are so rash as to have committed themselves on so important a point without much deliberate reflection, and the House went no further than to direct an inquiry into the fact. Although Congress pretend not to infallibility, yet it is not impossible (perhaps even not improbable) that there may be in that body some members as capable of judging what is constitutional or not, as some of the members of the Circuit Court; that there are some as good lawyers, no one will doubt. But while the panegyrist of the Circuit Court refuses to ascribe infallibility to Congress, is he justified in clothing the Circuit Court with that quality? If the cloak of infallibility be torn from the shoulders of Con-

[1] *National Gazette* (Phil.), April 16, 19, 1792; *Norwich Packet* (Conn.), April 26, May 3, 1792; *General Advertiser* (Phil.), April 20, 21, 1792; *Boston Gazette*, April 30, 1792; *Salem Gazette*, May 1, 1792; some Federalist papers also quoted the *National Gazette* article, see *New York Daily Advertiser*, April 21, 25, 1792; *Maryland Journal and Baltimore Advertiser*, April 20, 1792.

gress, would it not have been more discreet in the panegyrist to have reserved it for the shoulders of the Supreme Court, than to have hastily bestowed it on one Circuit Court; as it cannot cover the shoulders of the three Circuit Courts, it may so happen that they may give different opinions, in which case the other Circuit Courts may justly complain of partiality. The Southern Circuit Court may execute the Law in its full extent without any squeamishness or difficulty; the Eastern Circuit Court may execute the law, as commissioners; while the Middle Circuit Court may refuse to execute it at any rate. . . . In my next, I shall show that there is nothing in the Constitution to which the law in question is opposed and point out some of the serious and dangerous consequences which may result from a power in the Judges to refuse the performance of duties assigned to them by law.

But to this "Camden" article, the *National Gazette* retorted that while humanity might be better pleased with the attitude towards the law adopted by the Judges of the Eastern Circuit, "they too have, tho' in a delicate manner, passed sentence of unconstitutionality on the invalid law";[1] and while "we do not mean to muffle up the Judges any more than Congress in the cloak of infallibility, we wish to see both parties amply clad, that is to say, with the garb of wisdom and righteousness." A month later, this Anti-Federalist paper, in noting "several circumstances highly interesting to the United States" which had marked the session of Congress just closed, said editorially: "The decision of the Judges against the constitutionality of an Act in which the Executive had concurred with the Legislative departments is the first instance in which that branch of the government has withstood the proceed-

[1] *National Gazette*, April 23, May 11, 1792; *Boston Gazette*, May 28, 1792; *New York Daily Advertiser*, May 14, 1792; *Dunlap's American Daily Advertiser*, May 11, 1792; a writer in *Claypoole's Daily Advertiser*, April 16, 1792, expressed the hope that the Judges "may do the same with the national bank" statute, recently enacted by Congress.

ings of the others; and being another resource admitted by the Constitution for its own defense, and for security of the rights which it guarantees to the several States and to individual citizens, it may be contemplated under some very pleasing aspects, without undertaking to decide on the merits of the particular question." That the action of the Judges was not regarded as subject to criticism by the Anti-Federalists was even more strongly shown by the fact that during the months of April and May, 1792, Chief Justice Jay was conducting a hotly contested campaign for Governor of the State of New York against George Clinton, and though attacks were made on Jay on many grounds, no Anti-Federalist opposed his judicial action, on this ground.[1]

On the other hand, leading Federalist newspapers, like Fenno's *Gazette of the United States*, took a non-committal position:[2] "The humane purposes of Congress in favor of the invalids are in some measure thwarted by the unconstitutional objections of the Judges. It might be arrogant to express a doubt whether the opinion they have expressed be sound." The general attitude of the Federalists seems to have been one of apprehension lest the exercise of power by the Federal Courts to declare Acts of Congress invalid might strengthen the States at the expense of the National Government; and to this effect Fisher Ames wrote: "The decision of the Judges on the validity of our pension law, generally censured as indiscreet and erroneous. At best, our business is uphill and with the aid of our law Courts, the authority of Congress is barely adequate to keep the machine moving; but when they condemn the law as invalid, they

[1] Amongst other attacks, see *New York Daily Advertiser*, April 4, 1792, letter of "Aristides."

[2] *Gazette of the United States* (Phil.), May 9, 1792; *New Jersey Journal*, May 16, 1792; *Dunlap's American Daily Advertiser* (Phil.), May 10, 1792.

embolden the States and their Courts to make many claims of power, which, otherwise they would not have thought of."[1] Nevertheless, another equally strong Federalist, Edmund Randolph, the Attorney-General, took the opposite view, and in a letter to President Washington expressed the hope that the Judges would continue even firmer in denouncing infractions of the Constitution:

> It is much to be regretted that the Judiciary in spite of their apparent firmness in annulling the pension law are not, what sometime hence they will be, a resource against the infractions of the Constitution on the one hand, and a steady asserter of the Federal rights on the other. So crude is our Judiciary system, so jealous are State Judges of their authority, so ambiguous is the language of the Constitution that the most probable quarter from which an alarming discontent may proceed is the rivalship of these two orders of Judges. . . . Many severe experiments, the result of which upon the public mind cannot be foreseen, await the Judiciary; States are brought into Courts as defendants to the claims of land companies and of individuals; British debts rankle deep in the hearts of one part of the United States; and the precedent fixed by the condemnation of the pension law, if not reduced to its precise principles, may justify every constable in thwarting our laws.

In order to obtain a decision from the full Court, reducing its views to "precise principles", Randolph, acting officially as Attorney-General, filed a motion for a mandamus to the Circuit Court in Pennsylvania to command them to proceed on the petition of the invalid pensioner, Hayburn. The case was reported in *Dallas Reports* very briefly, but the contemporary newspapers give a far more complete account of this earliest of American constitutional cases, and describe it as follows:[2]

[1] *Works of Fisher Ames* (1854), I, letter of April 25, 1792.

[2] *General Advertiser* (Phil.), Aug. 16, 1792; *Gazette of the United States*, Aug. 25, 1792; *United States Chronicle* (Prov.), Aug. 30, 1792; *Massachusetts Spy*, Aug. 30, 1792.

The first question that arose was independent of the main question, viz., whether it was part of the duty of the Attorney General of the United States to superintend the decisions of the inferior courts, and if to him they appeared improper to move the Supreme Court for a revision. After some prefatory remarks the Attorney General was asked from the bench whether he conceived it to be an official right to offer such a motion as he had intimated it to be. He answered that he did conceive it to be an official right. Upon which several observations were made and the debate continued from day to day until Saturday last. In favor of the Attorney General's exercising this power, the following are the heads of the principal arguments insisted on — the analogy between the nature of that office here and in England, — that part of the Judiciary Act which gives the Attorney General a superintendence over the concerns of the United States in the Courts of Justice which, giving latitude to the word *concern* brought the case within the power granted by the law, — and the Attorney General being the only officer of the Supreme Executive to whom the Constitution gives a superintendence over the execution of all the laws of the Union. Against this opinion, it was alleged that the analogy drawn was not sound, but rather dangerous; that the latitude given to the word *concern* would tend to give that officer a right officially to interfere in any law controversy between citizens, as the United States were *concerned* in seeing justice done in every case, — and that as the act of the Attorney General was not within his ordinary duty, it would require special authority from the Supreme Executive to establish its propriety. These were the principal heads of the argument used. The discussion was full and the Bench divided on the question. Judges Iredell, Johnson and Blair, declaring in favor of the Attorney General and Judges Wilson, Cushing and the Chief Justice entertaining the contrary opinion. This equal division was sufficient to reject the mode of proceeding Mr. Randolph first adopted, who then started on another ground, as counsel for a petitioner who had been unsuccessful in an application to the District Court of Pennsylvania. His motion, after being accompanied with the reasons which induced him to believe the

inferior Courts had erred, was postponed for a final decision until the next Term.

And Randolph, writing to Madison, gave the following account, incidentally expressing his not very complimentary views of the Chief Justice:[1] "After I had finished my exordium which was strong and pointed, and after it was foreseen that I should speak with freedom, Mr. Jay asked me if I held myself officially authorized to move for a mandamus. I assigned reasons in the affirmative and refused to make the motion until the official question was decided. It continued from day to day until yesterday, when Johnson, Iredell, and Blair were in favor of my power, and the other three against it. The motion was therefore necessarily waived for the present in an official form. But being resolved that the Court should hear what I thought the truth, I offered it, as counsel for the invalids. . . . An opinion which has long been entertained by others is riveted in my breast concerning the C. J. He has a nervous and imposing elocution, and striking lineaments of face, well adapted to his real character. He is clear, too, in the expression of his ideas, but that they do not abound on legal subjects has been proved to my conviction. In two judgments which he gave last week, one of which was written, there was no method, no legal principle, no system of reasoning!" Hayburn's case was never decided by the Court; for Congress intervened by changing the statute involved. Meanwhile, the Judges, though adhering to their decision on Circuit not to act in their judicial capacity under the law, decided (all, except Wilson) to construe the statute as authorizing them to act unofficially as

[1] *Omitted Chapters of History Disclosed in the Life and Papers of Edmund Randolph* (1888), by Moncure D. Conway, 145, letter of Aug. 12, 1792.

Commissioners.[1] To test the validity of the action of the Judges as Commissioners, Congress, by Act of February 28, 1793, after repealing parts of the earlier questionable statute, made an express provision for the institution of a suit by the Attorney-General; and in compliance with this Legislative direction, the Attorney-General moved the Supreme Court for a mandamus against the Secretary of War to require him to put on "the pension list one of those who had been approved by the Judges acting in the character of Commissioners." The result of this motion he described in a letter to the Secretary: "Two of the Judges having expressed their disinclination to hear a motion in behalf of a man who had not employed me for that purpose, and I being unwilling to embarass a great question with little intrusions, it seems best to waive the motion until some of the invalids themselves should speak to counsel. To this end, I beg leave to suggest

[1] Cushing wrote to Jay, Oct. 3, 1792, from New Jersey: "There being no determination upon the subject in that district before . . . we acted as Commissioners and sent our certificates accordingly (without making any entry on the book about it) to the *Supreme* Secretary of War." As to this action, the *New Jersey Journal* (Elizabethtown, N. J.) said, June 6, 1792: "Who ever has attended the Circuit Court of the United States, the present term, must have been affected at the many objects who presented themselves as candidates for pensions. To see the lame and emaciated, war-worn soldier, the decrepit and almost naked seaman — the best years of whose life had been spent in the service of his country, humbly supplicating the scanty morsel to save him from perishing was a sight which affected every benevolent and generous heart present. . . . But the attention of the Hon. Judges was commensurate with the necessities of the wretches who applied." In Connecticut, Judges Iredell and Law decided to act as Commissioners in a case of John Chandler. "We have had a great deal of business to do here, particularly as I have reconciled myself to the propriety of doing invalid business out of Court. Judge Wilson altogether declines it," wrote Judge Iredell, Sept. 25, 1792. This decision of the Judges was commended by the *Connecticut Courant*, Oct. 7, 1792; *Connecticut Journal*, Oct. 3, 1792, *Norwich Packet*, Oct. 11, 1792, as follows: "We are equally happy in mentioning to the public that two of the Judges have, notwithstanding some objections, consented to act as Commissioners in executing the Pension Law. Their candor and indulgence in proceeding to the laborious task of examining the claims of the numerous applicants for pensions; a task which, in their opinion, their duty does not require them to undertake, do great honor to their humanity and compassion. It is hoped and presumed that the crippled soldier, the war-torn veteran will now obtain that justice which he long ago ought to have obtained from his unfeeling countrymen."

the propriety of a letter from your office to such of the invalids as have been certified to be proper for pensions, and perhaps it may be well to intimate the turn which the affair has taken and I have just mentioned. It was very unlucky that, although one of the invalids was in Court when I made the motion, and heard the difficulty, he omitted to notify himself to me until the Court had risen and it was too late." [1]

The Attorney-General's action producing no results, a petition for mandamus against the Secretary of War was brought by a petitioner, John Chandler, which was heard on February 5 and decided February 14, 1794, in which the Court ruled: "Having considered the two Acts of Congress relating to the same, we are of opinion that a mandamus cannot issue to the Secretary of War for the purpose expressed in said motion." Three days later, another suit brought by the United States against a pensioner, Yale Todd, was decided in which the Court held in substance that the decisions of the Judges acting as Commissioners were without legal force. In both of these cases, the Court appears to have found it unnecessary to pass upon the constitutionality of the Act of 1792, for it held that the construction and theory of the Act adopted by the Judges, that it gave them authority to act as Commissioners, and not as Judges of the Court was untenable.[2] The

[1] *Amer. State Papers, Misc.*, I, No. 47; letter of Aug. 4, 1793; see *The Case of John Chandler*, by Gordon E. Sherman, *Yale Law Rev.* (1905), XIV; *7th Cong., 1st Sess.*, 742, 772, 780, 903, 904; *United States* v. *Yale Todd*, reported in 13 How. 52, note. The Act of Congress referred to was Section 3 of the Act of February 28, 1793 (1 Stat. 325): "It shall be the duty of the Secretary of War, in conjunction with the Attorney General, to take such measures as may be necessary to obtain an adjudication of the Supreme Court of the United States on the validity of any such rights claimed under the acts aforesaid, by the determination of certain persons styling themselves commissioners." Neither the Chandler nor the Todd cases were reported in *Dallas Reports*.

[2] See letter of Attorney-General Bradford to the Secretary of War, Feb. 17, 1794, announcing the result as follows: "That Court has this day determined (in the case of Todd) that such adjudications are not valid"; and letter of Secre-

great question, therefore, of the power of the Judiciary with respect to the validity of Federal statutes was postponed for consideration until a later date. As pointed out above, however, the striking fact about the episode is that this first refusal by Supreme Court Judges on Circuit to acknowledge the validity of an Act of Congress seems to have been heartily supported by the adherents of the political party which favored a strict construction of the Constitution and to have been opposed by the party which was devoted to Nationalist theories. A review of the contemporary writings and journals from 1789 to 1802 clearly demonstrates that it was frequently the Anti-Federalists who supported the right of the Court to pass upon the constitutional validity of legislation, because they felt that it was the great guarantee of protection to State and individual rights against Congressional invasion, and that only in this manner would the power of the Federal Government be curbed ;[1] they welcomed the Court as a needed check upon Congress ; and it was in the writings of two strong Federalists, Zephaniah Swift of Connecticut and Richard Dobbs Spaight of North Carolina,

tary of War Knox to the Senate and House, Feb. 21, 1794, reporting that "such adjudication has been recently obtained and that the determinations of the commissioners were held to convey no legal rights to the invalids claiming under them." *Amer. State Papers, Misc.*, I, 47.

Several legal writers have stated that the Court held the statute unconstitutional; but as pointed out by James B. Thayer in his *Constitutional Cases*, I, 105, note: "It is inaccurate to say that this case holds the Act of 1792 to be unconstitutional as appears to be said in the note in 13 How. 52, and as is expressly said in the Reporter's Note in 131 U. S. App." Farrand also says that "probably the Court did not formally declare the Act unconstitutional. . . . It is altogether probable that the Court evaded the issue." See *contra*, however, Shiras, J., in *Re Sanborn* (1893), 148 U. S. 222.

[1] That strong Anti-Federalist, Governor John Hancock, in his address to the Massachusetts Legislature, June 3, 1790, said: "Our persons and possessions are governed by standing and known laws and secured by a Constitution formed by ourselves. This Constitution is a law to the legislative authority itself, and lest the pride of office or the hand of lawless power should rob the people of their constitutional security, a proper balance is provided in the Judicial Department"; see *Gazette of the United States*, June 9, 1790.

that the chief attack was made on this form of judicial power.[1]

Whatever may have been the attitude of the Anti-Federalist and of the Southern statesman at a later date, it is clear that at the outset they fully recognized and indorsed the exercise of judicial review. This was very strongly shown during a debate which had occurred in June, 1789, in the First Congress, when a bill was proposed making the Secretary of Foreign Affairs removable by the President. Objection being raised to the constitutionality of this measure, it was emphatically contended by the Congressmen from the Southern States and by the Anti-Federalists that Congress ought not to legislate, since the question of the President's power to remove was one which must be settled by the Judiciary.[2] Abraham Baldwin of Georgia said: "It is their province to decide upon our laws and if they find them to be unconstitutional, they will not hesitate to declare it so." John Page of Virginia said that the Constitution ought to be left "to the proper expositors of it" — the Judges. William Smith of South Carolina stated that the question of the President's right of removal should be "left to the decision of the Judiciary", who on a mandamus "would determine whether the President exercised a constitutional authority or not." This statement was very significant, in view of the fact that Jefferson, fourteen years

[1] See *A System of the Laws of the State of Connecticut* (1795), by Zephaniah Swift, I, 51–53; *Iredell*, II, letter of Spaight, Aug. 12, 1787; see also *infra*, 257. It is interesting to note that the Anti-Federalists were equally pleased when, in 1792, President Washington curbed the power of Congress by vetoing a statute apportioning Congressmen, on the ground that it was unconstitutional. "This Act of decision, firmness and independence," wrote James Monroe to John Breckenridge, "has presented a ray of hope to the desponding, in and out of the republican party. He inspires men with a confidence that the government contains within itself a resource capable of resisting every encroachment on the publick rights." *Breckenridge Papers MSS*, letter of April 6, 1792.

[2] *1st Cong., 1st Sess.*, debate in the House, June 16, 17, 18, 19, 22, 1789.

later, objected to the right of the Judges to issue a mandamus to his Cabinet officer. Alexander White of Virginia said: "I would rather the Judiciary should decide the point because it is more properly within their department"; and again: "I imagine the Legislature may construe the Constitution with respect to the powers annexed to their department, but subject to the decision of the Judges." It remained, however, for Elbridge Gerry, who later became one of the strongest of the Anti-Federalists, to assert most clearly that: "The Judges are the constitutional umpire on such questions. . . . We are not the expositors of the Constitution. The Judges are the expositors of the Constitution and Acts of Congress. Our exposition, therefore, would be subject to their revisal. The Judiciary may disagree with us and undo what all our efforts have labored to accomplish." And Gerry further asked whether the Judges "because Congress has usurped power", were to be impeached "for doing a meritorious act and standing in opposition to their (*i.e.* the Congress') usurpation of power?" It thus appears that in these early days, it was not "usurpation of power" by the Courts which was talked of, but rather, "usurpation of power" by Congress.[1] Two years later, the debate in Congress over the chartering of the Bank of North America disclosed again a general concurrence of opinion among Congressmen, both of the South and the North, as to the right of the Court to adjudicate upon the constitutionality of the measure.[2]

[1] In this same debate, the following Federalists also contended for the power of the Judiciary. Fisher Ames of Massachusetts stated that: "If we declared improperly, the Judiciary will revise our decision." John Lawrence of New York said: "If the laws shall be in violation of any part of the Constitution, the Judges will not hesitate to decide against them." Peter Silvester of New York said: "If we are wrong, they (the Judiciary) can correct our error." William Smith of Maryland said: "It is the duty of your Legislature to make your laws; your Judges are to expound them."

[2] *1st Cong., 3d Sess.*, speeches in the House of Elias Boudinot of New Jersey,

While, as seen above, the decisions of the Federal Circuit Courts in the early years were received in general with approbation, the Circuit Court system itself was regarded from the beginning as decidedly unsatisfactory, both by the Judges themselves, by the litigants and by the general public. The Judges of the Supreme Court strongly objected to the imposition on them of this Circuit duty, and Chief Justice Jay wrote to the President, as early as September, 1790, urging that the provisions of the Judiciary Act with reference to such duty be altered, and contending that it was inconsistent and incompatible for the Supreme Court Judges to sit in both Courts, and that Congress had no constitutional power to impose these functions upon the Judges. At the end of this first year, 1790, Attorney-General Edmund Randolph in a report to Congress urging changes in the Judiciary Act also advocated abolition of this Circuit duty, saying: "Those who pronounce the law of the land without appeal ought to be pre-eminent in most endowments of the mind. Survey the functions of a Judge of the Supreme Court. He must be a master of the common law in all its divisions, a Chancellor, a civilian, a Federal jurist and skilled in the laws of each State. To expect that, in future times, this assemblage of talents will be ready, without further study, for the National service is to confide too largely in the public fortune. Most vacancies on the Bench will be supplied by professional men, who, perhaps, have been too much animated by the contentions of the Bar deliberately to explore this extensive range of science. In a great measure, then, the Supreme Judges will form themselves after their nomination. But what leisure remains from their itinerant

and John Lawrence of New York, Feb. 4, 1791, William Smith of South Carolina, Feb. 5, William B. Giles of Virginia, Feb. 7. See also *The Doctrine of Judicial Review* (1914), by Edward S. Corwin.

dispensation of justice? Sum up all the fragments of their time, hold their fatigue at naught, and let them bid adieu to all domestic concerns, still the average term of a life, already advanced, will be too short for any important proficiency."[1] Randolph further pointed out that it would be difficult for the Judges who had given an opinion on Circuit to change it when they sat in the full Court. He feared jealousies and antagonism would creep among them. He also urged that if the Court became stationary, the Judges would be able to make reports of their decisions, which would be valuable to "announce the talents of the Judge"; and that "if the Judge whose reputation has raised him to office shall be in the habit of delivering feeble opinions, these reports will first excite surprise, and afterwards a suspicion, which will terminate in a vigilance over his actions."

It was soon found that the burden thus placed upon the Judges was intolerable. The mere physical labor of travel, in view of the great distances and scanty means of transportation, was thoroughly exhausting. Judge Iredell, who had the Southern Circuit entailing a tour of the States of North and South Carolina and Georgia twice a year, as well as a journey twice a year to and from Philadelphia of nearly two thousand miles, quite reasonably termed his life that of a "travelling postboy", and writing to Chief Justice Jay, in February, 1791, said that "no Judge could conscientiously undertake to ride that Circuit and perform the other parts of his duty." Jay, himself, who had the Northern Circuit, wrote that "the Circuits press hard on us all." Judge Johnson resigned rather than undertake the labor.

[1] *Iredell*, II, 292, 372, letter of Jay to Iredell, Sept. 15, 1790, inclosing draft of his letter of the President; letter of Iredell to Jay, Cushing, and Wilson, Feb. 11, 1791, protesting the arrangement of Circuits and requesting a rotation. *Amer. State Papers, Misc.*, I, No. 17, report of Randolph, Dec. 27, 1790.

Finally, President Washington himself wrote, in August, 1791, that he hoped that Congress would give "relief from these disagreeable tours."[1] Besides the laborious duties it entailed, the system was defective for other reasons. "It has happened in more than one instance," wrote Jay to Rufus King, "that questions in the Circuit Court decided by one set of Judges in the affirmative had afterwards in the same Court been decided by others in the negative. As writs of error do not reach every case, this evil has no remedy. The natural tendency of such fluctuations is obvious; nor can they otherwise be avoided than by confining the Judges to their proper place, *viz.* the Supreme Court."[2] Frequently the Judges, through illness or impassable state of the highways, were unable to attend, and the consequent delays and postponements entailed great cost and hardships to litigants and injustice to persons held for trial for crimes.[3] The *National Gazette* said:

[1] *Washington*, X, letter of Aug. 7, 1791. Rufus King wrote to Southgate, Sept. 30, 1792: "I remember you have a cause in the Federal Courts that has been delayed for want of Judges to form a Court. Wilson and Iredell go to the Eastern Circuit. I have heard that Wilson casually observed (when here on his way to Connecticut, where he now is) that he should not go farther East than Boston and that Mr. Iredell would go to New Hampshire."

[2] *King*, I, Dec. 19, 1793.

[3] In the *National Gazette*, Jan. 5, 1793, a correspondent from Newbern, N. C., wrote Dec. 11, 1792: "The Circuit Court of the United States was opened here on the 30th of November and continued open from day to day until Tuesday the 11th inst., when it was adjourned by the District Judge until the 1st of June, next. No business of any kind was done, owing to the absence of the Circuit or Associate Justice. The jurors attended with great punctuality and patience the whole time, although this is a very busy and important season with the planter and farmer. Mr. Johnson, one of the Associate Justices, had held the Courts in South Carolina and Georgia, and was taken ill at Augusta and his letter authorizing the adjournment of the Court was not received until Monday, the 10th. Several pirates have been for many months confined here in a loathsome dungeon, praying for their execution as a tender mercy compared with their present confinement — and two persons, who were only so unfortunate as to be witnesses of their crimes, not being able to give security for their appearance, are confined in a manner not much more comfortable. These poor wretches are now doomed to suffer the inclemencies of the winter in a situation already shocking to humanity." See also a letter from a citizen of Delaware describing the failure of Judges Iredell and Wilson to attend a Federal Circuit Court in that State: "Most people know

The judicial system was so defective, both in point of principle and arrangement, and so awkward and unwieldy in its operation that the second session of Congress saw the necessity of an entire alteration; they modestly avoided the work themselves, as if it had been a task beyond their strength, notwithstanding the number of professional gentlemen in both houses, and ordered the Attorney General, in the Congressional style, a sort of Secretary of the Law Department, to report the necessary amendments; — an elaborate folio pamphlet appeared at the next session, and the people expected the business would have been immediately taken up, had not another of their Secretaries made a report on a project infinitely more interesting (to individuals); and this elegant piece of refinement and obscurity, the report of the Secretary at Law, was immediately consigned to oblivion; and the great object of the administration of justice, and the reputation of the National Government were equally forgotten and neglected.

The Judges themselves united in writing to the President an urgent letter, August 19, 1792, which he transmitted to Congress, in which they said: [1]

We really, sir, find the burdens laid upon us so excessive that we cannot forbear representing them in strong and explicit terms. On extraordinary occasions, we shall always be ready, as good citizens, to make extraordinary exertions; but while our country enjoys prosperity, and nothing occurs to require or justify such severities, we cannot reconcile ourselves to the idea of existing in exile from our families, and of being subjected to a kind of life on which we cannot reflect without experiencing sensations and emotions more easy to conceive than proper for us to express. . . . That the task of holding twenty-seven Circuit Courts a year, in the different States, from New Hampshire to Georgia, besides

that these gentlemen get very handsome salaries and they know also from the sweat of whose brows it comes; they know more than this, they know whose right it is to call them to account for their malpractices. The Government will be found expensive enough under the most economical administration. But to lavish the time and property of the citizens unnecessarily is what they cannot nor will not submit to." *National Gazette*, May 11, 1793.

[1] *Amer. State Papers, Misc.*, I, No. 32.

two sessions of the Supreme Court at Philadelphia, in the two most severe seasons of the year, is a task which, considering the extent of the United States and the small number of Judges, is too burdensome. That to require of the Judges to pass the greater part of their days on the road, and at inns, and at a distance from their families, is a requisition which, in their opinion, should not be made unless in cases of necessity.

Congress paid no heed to the request;[1] but it lightened the labors of the Judges somewhat by passing the Act of March 2, 1793, which provided that the Circuit Courts should consist of one Supreme Court Judge and one District Judge; and thereafter, the Judges took the Circuits in turn, instead of being confined to fixed Circuits. In consequence of this change, Jay, who during the previous year had been a candidate for Governor of New York, because, as he wrote, "the office of a Judge of the Supreme Court of the United States was in a degree intolerable and therefore almost any other office of a suitable rank and emolument was preferable,"[2] decided to remain on the Bench. He still insisted, however, upon the weakness of the Federal Judiciary system. "The Federal Courts have enemies in all who fear their influence on State objects. It is to be wished that their defects should be corrected quietly. If these defects were all exposed to public view in striking colors, more enemies would arise, and the difficulty of mending them be increased. When it is considered that the important questions expected to arise in the Circuit Courts have now been decided

[1] Charles Carroll wrote to John Henry, Dec. 16, 1792: "Please to inform me as soon as you can what alterations of the judicial system are in contemplation. I have heard it rumored that the State Judges are to be made Judges of the United States within the jurisdiction or boundaries of each State, and the Supreme Court to be sedentary at the seat of Congress. Such a system will never answer." *Life of Charles Carroll of Carrollton* (1898), by Kate Mason Rowland.

[2] See letter of Egbert Benson to Rufus King, Dec. 18, 1793, reporting Jay's answer to a second request to run for Governor. *King*, I.

in them, I can conceive of no reason for continuing to send the Supreme Court Judges to preside in them, of equal weight with the objections which oppose that measure."[1]

[1] *King*, I, letter of Jay to King, Dec. 22, 1793. Other Federalists continued to urge the necessity of amendment of the judicial system, which, they said, "is defective throughout and wholly inadequate to its object." *New York Daily Advertiser*, Feb. 14, 1793. All the Judges united in an address to the President, Feb. 18, 1794, calling his attention again to defects in the Judiciary system. *Amer. State Papers, Misc.*, I, 46.

NOTE. A letter from Philadelphia in *Massachusetts Centinel*, July 23, 1788, said that Mr. (John) Adams will undoubtedly be Chief Justice of the Federal Judiciary." The *Federal Gazette* (Phil.), March 9, 1789, said: "It is with singular pleasure we hear that James Wilson, Esq., of this State is destined by the voice of many thousand Federalists to fill the station of Chief Justice of the United States. . . . The office allotted for that distinguished patriot and legislator by his grateful countrymen will require an uncommon share of legal and political abilities and information. A new system of federal jurisprudence must be formed; a new region in the administration of justice must be explored in which genius alone can supply the defect of precedent. And who so equal to those great and original undertakings as that favorite son of Pennsylvania, James Wilson, Esq.?" See also *Massachusetts Centinel*, March 24, June 17, 1789; Virginia *Independent Chronicle*, March 25, 1789; *State Gazette of North Carolina*, April 9, 1789. There was opposition to Wilson's appointment, *Independent Gazetteer* (Phil.), Feb. 27, 1788, June 9, 1789. The "gentlemen of the law" in Philadelphia wished for the appointment of Edward Shippen as a Justice on the first Court. *Life, Public Services, Addresses and Letters of Elisha Boudinot* (1896), II, 53.

A letter from R. H. Harrison to Washington of Jan. 31, 1790, discloses that Harrison's refusal of his appointment as Justice was due to his ill health; see *New York Times*, Aug. 26, 1923. Washington wrote in his Diary of Feb. 6, 1790: "The resignation of Mr. Harrison as an Associate Judge making a nomination of some other character to supply his place necessary, I determined, after contemplating every character which presented itself to my view, to name Mr. Iredell of North Carolina; because, in addition to the reputation he sustains for abilities, legal knowledge and respectability of character, he is of a State of some importance in the Union that has given no character to a federal office. In ascertaining the character of this gentleman, I had recourse to every means of information in my power and found them all concurring in his favor."

As to actual service on Circuit in Georgia and South Carolina by John Rutledge as Associate Justice of the Supreme Court, see *Charleston City Gazette*, June 10, 1790; *Iredell*, II, letters of May 12, 23, 29, June 7, 1790. Rutledge resigned March 5, 1791.

Van Horne v. *Dorrance* was taken to the Supreme Court on writ of error, but never prosecuted. *American Daily Advertiser*, Dec. 9, 10, 11, 1801; *Aurora*, Dec. 9, 10, 17, 30, 1799.

CHAPTER TWO

STATE SOVEREIGNTY AND NEUTRALITY

1792–1794

MEANWHILE, though the Federal Circuit Courts in these early years were dealing with questions affecting State sovereignty without arousing State jealousy, the danger of a clash between Federal and State authority in the Supreme Court itself was grave and imminent, owing to the appearance on its docket of a number of suits instituted by private individuals against the States themselves. The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted. Yet, in spite of all such disclaimers, the very first suit entered in the Court at its February Term in 1791 was brought against the State of Maryland by a firm of Dutch bankers as creditors; and the question of State sovereignty became at once a judicial issue.[1] The next year, at the February, 1792, Term, a second suit was entered by an individual against the State of New York; and at the same time a suit in

[1] *Vanstophorst* v. *Maryland*, of which no report is made in 2 Dallas at the February, 1791, Term; but a motion for a commission to examine witnesses ordered by the Court at the August, 1791, Term is noted in 2 Dallas, 401; *Oswald* v. *New York*, *ibid.*, 401.

equity was instituted by a land company against the State of Virginia.[1] These suits aroused great alarm, particularly among those who had opposed the adoption of the Constitution and who still feared lest the independence of the State Governments should be lost in the increasing growth and consolidation of the powers of the Federal Government in all its branches. A Committee of the Legislature of Virginia, in June, 1792, protested against the illegality of the suit against that State, saying that "the jurisdiction of the Court does not and cannot extend to this case . . . and that the State cannot be made a defendant in the said Court at the suit of any individual or individuals", and it resolved "that the Executive be requested to pursue such measures as may seem most conducive to the interest, honor and dignity of the Commonwealth."[2] How extravagant were the apprehensions of the result of the maintenance of such suits, a letter from Philadelphia appearing in many newspapers of the day well illustrates: "The writ was served upon the Governor (of Maryland), the Supreme Executive of the State and upon the Attorney General. Two months were given for the State to plead. Should this action be maintained, one great National question will be settled — that is, that the

[1] The case was *Indiana Company* v. *Virginia*, not reported in *Dallas Reports* but commented on in *Patrick Henry* (1909), by William Wirt Henry, II, 462, 538; *George Mason, Life, Correspondence and Speeches* (1912), by Kate Mason Rowland, II, 342–345. See also letter from William R. Davie of North Carolina to Judge Iredell, June 12, 1793: "In your letter of 14th of February, you mention a bill in equity being filed by the Indiana Company to recover damages, etc. This is surely of the first *impression* and has excited my curiosity very much. Pray what rules are you guided by in the Supreme Court; for this is not the first novelty your practice there has produced."

[2] See *Observations upon the Government of the United States of America* (1791), by James Sullivan, Attorney-General of the State of Massachusetts and a reply thereto, *An Enquiry into the Constitutional Authority of the Supreme Federal Court over the Several States in Their Political Character* (1792), by a Citizen of South Carolina (David Ramsay); Dunlap's *American Daily Advertiser*, Feb. 3, 1792; *Gazette of the United States*, Feb. 20, 1790, Feb. 4, 1792; *Connecticut Courant*, March 7, 1791; *New York Journal*, March 24, 1791; *Federal Gazette*, Feb. 25, 1790.

several States have relinquished all their Sovereignties, and have become mere corporations, upon the establishment of the National Government; for a sovereign State can never be sued or coerced by the authority of another government. Should this point be supported in favour of this cause against Maryland, each State in the Union may be sued by the possessors of their public securities and by all their creditors. As the executions will be against them as mere corporations, they will be issued against all the inhabitants generally; the Governour and all other citizens will be alike liable. Such offices will not be coveted. Even the constitutional privileges in the several States against arresting Senators and Representatives while the Courts are sitting, will be done away with." The issue came squarely before the Court in a suit brought at the August, 1792, Term by two citizens of South Carolina, executors of a British creditor, against the State of Georgia, *Chisholm* v. *Georgia*, 2 Dallas, 419. A motion was made on August 11 by Attorney-General Edmund Randolph, as counsel for the plaintiff, that unless the State should enter its appearance at the next Term, a judgment should be entered against it.[1] The Court, however, was anxious "to avoid every appearance of precipitancy and to give the State time to deliberate on the measures she ought to adopt", and consequently

[1] In *Marshall*, III, 554, note 2, 582, it is stated that *Chisholm* v. *Georgia* involved Yazoo land grants; this is a mistake, it was the case of *Moultrie* v. *Georgia*, filed in 1796, which involved such grants.

Dallas in his Reports does not state the circumstances under which the *Chisholm Case* arose. They were as follows (see Philadelphia dispatch in *Salem Gazette*, March 6, 1793): "A citizen of Georgia had left America prior to the Revolution and removed to Great Britain, after settling a partnership account with two partners in trade whose bonds he took for the balance due. After his decease, his executors (who were citizens of South Carolina) on making application for payment found that these two persons who had given their joint bonds had been inimical to the cause of liberty in the United States and that their property was confiscated. The executors, alleging that the bond was given previous to the Revolution, applied to the State of Georgia for relief."

postponed consideration of the motion to the next Term. On February 5, 1793, the case came on for argument, the State of Georgia refusing to appear and presenting a written remonstrance of protestation through Alexander J. Dallas and Jared Ingersoll of Pennsylvania, denying the jurisdiction of the Court to entertain any such suit. To this attitude, Attorney-General Randolph, who appeared for the plaintiff, referred in opening his argument, saying: "I did not want the remonstrance of Georgia, to satisfy me that the motion which I have made is unpopular. Before that remonstrance was read, I had learned from the acts of another State, whose will must always be dear to me, that she too condemned it. On ordinary occasions, these dignified opinions might influence me greatly; but, on this, which brings into question a constitutional right, supported by my own conviction, to surrender it would be in me an official perfidy." On February 18, 1793, only fourteen days after Randolph's argument, the Court rendered its decision, sustaining the right of a citizen of one State to institute an original suit in the Supreme Court against another State for breach of contract. The public interest in the case was so great that the Clerk of the Court, Samuel Bayard, issued to the newspapers a comprehensive summary which, he stated, "will be found accurate, though by no means so full as I could wish. As the determination of Monday may perhaps give umbrage to the advocates of 'State Sovereignty', it is ardently wished that the arguments of the Judges and the speech of the Attorney General on this important subject may early be submitted to the public eye."[1] After reciting the preliminary

[1] This account has, so far as is known, never been republished; it gives a more concise and more vivid picture of the case than that which appeared in 2 Dallas. It was published in Dunlap's *American Daily Advertiser*, Feb. 21, 1793. See also *Aurora*, Feb. 22, 1793; *Gazette of the United States*, Feb. 23, 1793; *Columbian Centinel*, March 2, 1793, and many other newspapers.

steps taken in the case and describing Randolph's able argument of two and one half hours, the summary continued: "When Mr. Randolph had closed his speech, the Court, after remarking on the importance of the subject now before them, and the necessity of obtaining every possible light on it, expressed a wish to hear any gentleman of the Bar who might be disposed to take up the gauntlet in opposition to the Attorney General. As no gentlemen, however, were so disposed, the Court held the matter under advisement until Monday, the 18th instant, when in presence of a numerous and respectable audience, they severally declared their opinions on the question that had been argued. Judge Iredell was first called on by the Chief Justice for his opinion. In an argument of an hour and a quarter, he maintained the negative of this question; he considered the States as so many separate independent sovereignties. . . . Judge Wilson next took a very broad and enlarged view of the question, which he thought would again resolve itself into a question of no less magnitude than whether the people of the United States formed a nation. . . . His argument was elegant, learned and contained principles and sentiments highly republican. It occupied an hour and concluded pointedly and unequivocally for the motion of Mr. Randolph.[1] . . . Chief Justice Jay delivered one of the most clear, profound, and elegant arguments perhaps ever given in a Court of Judicature." Short accounts of Judge Blair's and Judge Cushing's opinions were also given.

[1] In Judge Wilson's opinion, the opening words of which now read: "This is a case of uncommon magnitude. One of the parties to it is a State, certainly respectable, claiming to be sovereign. The question to be determined is, whether this State so respectable, and whose claim soars so high is amenable to the jurisdiction of the Supreme Court of the United States?" there was an interesting change made from his original draft. In the draft in Wilson's handwriting which is now in the Library of the Historical Society of Pennsylvania, the second sentence reads: "One of the parties *who appears before this tribunal* is a State", etc. The words in italics were omitted in the opinion as delivered.

The decision fell upon the country with a profound shock. Both the Bar and the public in general appeared entirely unprepared for the doctrine upheld by the Court; and their surprise was warranted, when they recalled the fact that the vesting of any such jurisdiction over sovereign States had been expressly disclaimed and even resented by the great defenders of the Constitution, during the days of the contest over its adoption. Some of the ultra-Federalists now upheld the decision of the Court, which, they said, "fixes a most material and rational feature in the Judiciary of the United States that every individual of any State has the natural privilege of suing either the United States, or any State whatsoever in the Union, for redress in all cases where he can prove a just claim, a loss or any injury."[1] Many others of the Federalist Party and practically the entire body of Anti-Federalists were excitedly opposed to the "extraordinary determination" enounced by the Court. "Its novelty," said a Boston newspaper, "is not less striking than the importance of the consequences which may result from an acquiescence in this stride of authority. . . . When the persons in opposition to the acceptance of the new Constitution hinged on the Article respecting the power of the Judiciary Department being so very extensive and alarming as to comprehend even the State itself as a party to an action of debt, this was denied peremptorily by the Federalists as an absurdity in terms. But it is now said that the eloquent and profound reasoning of the Chief Justice has made that to be right which was, at first, doubtful or improper."[2] Another newspaper

[1] Philadelphia dispatch to *Connecticut Courant*, Feb. 25, 1793; *American Daily Advertiser*, Feb. 19, 1793; *Providence Gazette*, March 2, 1793. See also letter from "Solon" in *Independent Chronicle*, Sept. 19, 1793, stating that individual citizens ought to have their rights protected and be as able to sue a State as any other corporation.

[2] *Independent Chronicle*, April 4, 1793.

writer alleged that the decision "involved more danger to the liberties of America than the claims of the British Parliament to tax us without our consent. . . . If you submit to the demand, you will authorize a sovereign jurisdiction to exercise a power which can never be exercised by it but to the destruction of your own power, to the overthrow of the State Governments, to the consolidation of the Union for the purpose of arbitrary power, to the downfall of liberty and the subversion of the rights of the people; for whenever all the important powers of government shall be centred in that of the United States, it will be without check or control." Others said that "if the sovereignty of the States is to be thus annihilated, there must be a consolidated Government and a standing army", and that the "craft and subtility of lawyers" had introduced this clause into the Constitution as "the plan of all aristocrats to reduce the States to corporations."[1] Another stated that it "fritters States away to corporations." Another said that: "It must excite serious ideas in those who have from the beginning been inclined to suspect that the absorption of the State governments

[1] It was also said that this "usurpation" was "apprehended by many of the members of the Massachusetts Convention when deliberating on that very clause of the Federal Constitution, respecting the Judiciary power, but which apprehensions were said to be groundless by the advocates of the Constitution." See letter of "Brutus"; letter of "A Republican"; article on "The Crisis"; letter from "Hampden"; letter from "Sydney" to "Crito" in *Independent Chronicle*, July 18, 25, Aug. 1, 15, 1793; see also *Boston Gazette*, Sept. 23, 1793. See letters from "Anti-Wizard" in *Columbian Centinel*, Aug. 3, 10, 1793. To Federalist letters referring to the "inflammatory strictures on the Chisholm Case" and stating that: "If by losing independence is meant losing the power of doing wrong, if setting justice and common sense at defiance, if oppressing the individual with the insulting reply that the State is above the law, lawless, then God be praised that such independence exists no longer", the Anti-Federalists made reply that the writers were evidently "a member of the tribe of monarchy men", "an old Tory . . . who wishes for an opportunity of getting back from the Government some confiscated property", "a sophistical aristocrat whose writings are calculated to introduce a consolidated Government"; see *Columbian Centinel*, July 31, Aug. 3, 7, 10, 1792; see also letter of "Crito", a Federalist, and of "Uncle Toby", "Essex", and "Sydney", Anti-Federalists, in *Salem Gazette*, July 30, Aug. 6, 13, 15, 20, 27, 1793.

has long been a matter determined on by certain influential characters in this country who are aiming gradually at monarchy. Federal jurisprudence has aimed a blow at the sovereignty of the individual States, and the late decision of the Supreme tribunal of the Union has placed the ridgepole on the wide-extended fabrick of consolidation. The representatives of the free citizens of the independent States will, no doubt, cherish the spirit of investigation and remonstrate on this subject with wisdom and firmness." [1] A Federalist paper in Massachusetts remarked editorially that "the decision has excited great apprehension in some. . . . Many pieces have already appeared in the public papers on the subject, some of which at least are expressed more to the passions than to the reason." [2]

[1] *National Gazette*, June 1, 1793; *Boston Gazette*, Aug. 5, 1793.

[2] *Salem Gazette*, July 23, 1793. This paper was one of the few which published Chief Justice Jay's opinion in full, saying: "Jay appears to have investigated the subject with great coolness, candor and regard to the rights of citizens." The *Gazette of the United States*, Aug. 10, 14, 17, 1793, also printed the opinion in full. Most of the papers, however, printed only a short summary. An interesting complaint as to this failure of publicity appeared in a letter to the *National Gazette*, Aug. 10, 1793: "Mr. Freneau. I have heard nothing more regretted by the best friends of our country, than the manner adopted on publishing the opinions of the Judges of the Supreme Court of the United States in the most important question which ever did, or ever will, come before that Judicature, viz. the suability of a State in that Court by a citizen of another State. So just, so wise, so important a decision could not have been made too public; the respective opinions of the Judges ought to have been inserted at large in all the newspapers throughout the continent; and this would undoubtedly have been the case, had not a copyright been made of them. Good policy would have induced an unlimited publication, but a more effectual mode could not have been adopted, than the one chosen, to prevent these important opinions from being read by the great bo ly of the people: a large pamphlet, price 50 cents, was made of them and claimed as a copyright, in order to prevent their being republished in the gazettes, whereas they ought to have been public property, that they might be published in a six penny pamphlet and in all the newspapers, in order that the great body of citizens might be informed of the great principles of this important decision. As an individual citizen, I hope it is not yet too late; and that the Judges at their ensuing session will direct their opinions at large to be published in the newspapers of your city, that the claim of a copyright therein may be withdrawn, and that public notice thereof may be given to the end that the people may have the necessary information whereby to judge of the meditated alteration in the Constitution of the United States by the enemies of equality. For my own part, I have never yet heard a good reason assigned, why a fraudulent State should not be amenable to justice, as well as a fraudulent individual, for such we know there are."

While this opposition to the Court's decision was to some extent based on divergencies of political theories as to State sovereignty, the real source of the attack on the *Chisholm Case* was the very concrete fear of the "numerous prosecutions that will immediately issue from the various claims of refugees, Tories, etc., that will introduce such a series of litigation as will throw every State in the Union into the greatest confusion." [1] In the crucial condition of the finances of most of the States at that time, only disaster was to be expected if suits could be successfully maintained by holders of State issues of paper and other credits, or by Loyalist refugees to recover property confiscated or sequestered by the States; and that this was no theoretical danger was shown by the immediate institution of such suits against the States in South Carolina, Georgia, Virginia and Massachusetts.[2] In the latter State, Governor John Hancock at once called a special session of the Legislature;[3] and that body, by resolve of Septem-

[1] "The subject is now but of infinite importance to the rights and property of every individual citizen. For should we acquiesce in the decision or take no measures to check its progress, the boasted liberties of our country . . . will become a 'sound and nothing else.'" *Independent Chronicle*, July 25, 1793. "Nothing remains but to give the key of our treasury to the agents of the Refugees, Tories and men who were inimical to our Revolution, to distribute the hard money now deposited in that office to persons of this description," *id.*, Sept. 16, 1793; see also *National Gazette*, Aug. 7, 1793.

[2] *Vassall* v. *Massachusetts*; *Huger* v. *South Carolina* (1797), 3 Dallas, 339; see *Moultrie* v. *Georgia* (not reported in *Dallas Reports*), referred to in *Howard* v. *Ingersoll* (1851), 13 How. 408, in which it is said that Georgia had, in 1796, "just been released from an unpleasant litigation." The case arose out of an Act passed by the State in 1789, conveying lands to the Virginia, South Carolina and Tennessee Yazoo Companies, before the 11th Amendment; a bill in equity was filed in 1796 for specific performance of the State's contract to convey land; it was set for hearing at the August Term in 1797, and adjourned to the next Term, when it was dismissed. *Amer. State Papers, Public Lands*, I, 167; *New York Spectator*, March 16, 1807. See also *Catlin* v. *South Carolina*, in the official records; *Grayson* v. *Virginia*, 3 Dallas, 320.

[3] The *Massachusetts Mercury*, July 16, 1793, said: "A correspondent thinks too much praise cannot be given to our worthy Governor for his vigilance in issuing a proclamation for the meeting of the General Court on the very day and perhaps at the moment when the Marshal of the District Court served him with a writ legally issued from the Supreme Court of the United States." "The precept now served on the Governor and Attorney General is for monies arising from the seques-

ber 27, 1793, urged upon Congress "the adoption of such Amendments to the Constitution as will remove any clause or Article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States." [1] The Legislature of Virginia adopted similar resolutions, stating that the Court's decision was "incompatible with and dangerous to the sovereignty and independence of the individual States, as the same tends to a general consolidation of these confederated republics." The State of Georgia took the most violent action; after the first continuance of the case in 1792, a resolution had been introduced into the Georgia Legislature, December 14, 1792, which, though not adopted, expressed the sentiment of the State, to the effect that it would not be bound by the decision of the Court and would regard it as "unconstitutional and extrajudicial." After the decision rendered by the Court and the default entered at the February Term of 1793, judgment for the plaintiff was entered and a writ of inquiry of damages awarded at the February Term in 1794. The writ, however, was never sued out or executed. Meanwhile, the House of Representatives in Georgia passed a bill, on November 21, 1793, providing that any Federal marshal or other person who executed any process issued by the Court in this case should be declared "guilty of felony and shall suffer death, without benefit of clergy, by being hanged." The bill, however,

tered property of a refugee. . . . If he should obtain what he has sued for, what a wide extended door will it open for every dirty Tory traitor to his country's liberties to enter." *Massachusetts Mercury*, July 23, 1793.

[1] As early as March, 1793, a Committee had been appointed by the Massachusetts Legislature to consider how far the State was directly or indirectly affected by the decision, "in order that our true situation may be known and understood, and such measures adopted on this occasion by the Commonwealth as its honour and interest may demand and the peace and safety of the Union require." See *Columbian Centinel*, March 23, 1793.

never became law.[1] In Congress, a resolution for an Amendment to the Constitution to counteract the effect of the case had been introduced into the House, February 19, 1793, the day after the decision, as follows: "that no State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States." On February 25, the Senate tabled another resolution, which was re-introduced January 2, 1794, and which finally became the Eleventh Amendment that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Though this Amendment was agreed to by the Senate, January 14, 1794, by a vote of 23 to 2, and on March 4 by the House by a vote of 81 to 9, it was not until January 8, 1798, nearly four years later, that the necessary number of States ratified it. New Jersey and Pennsylvania refused to ratify and South Carolina and Tennessee failed to take any action.[2] As soon as ratification took place, however,

[1] *State Documents on Federal Relations* (1911), by Herman V. Ames.

[2] It is curious to note the extremely informal and careless manner in which the ratification was promulgated, as described by Allen C. Braxton in *Virginia Bar Ass. Rep.* (1907), XX: "On January 8, 1798, President Adams transmitted to Congress a report of the Secretary of State containing a certified copy of the ratification by Kentucky of what the President described as 'the Amendment of the Constitution of the United States proposed by Congress in their resolution of the 2nd day of December, 1793, relative to the suability of the States.' The President then added, by the way, that 'this Amendment, having been adopted by three fourths of the several States may now be declared to be a part of the Constitution of the United States.' As a matter of fact, there was no such resolution as the President referred to, but the resolution proposing the Amendment was of January 2, 1794, instead of December 2, 1793. In addition to this, neither the President nor the Secretary of State ever did report what States constituted the three fourths which he said had ratified it. On the contrary, the records of the office of Secretary of State show only six States as having ratified the Eleventh Amendment.

the Court, in *Hollingsworth* v. *The State of Virginia*, 3 Dallas, 378, on February 4, 1798, declared that it had no jurisdiction "in any case, past or future in which a State was sued by citizens of another State, or by citizens, or subjects, of any foreign State." And thus all cases of this nature pending on its docket were swept away.

After delivering its fateful decision in the *Chisholm Case* in February, 1793, the Court rendered no further opinions for a year, owing to the fact that, at the time of its usual August Term, yellow fever was raging in Philadelphia.[1] When it met for its February Term in 1794, a new Judge took his place on the Bench — William Paterson of New Jersey — whom President Washington had appointed on March 4, 1793, to fill the vacancy caused by the resignation of Judge Thomas Johnson. Paterson, then forty-four years of age, was the Chancellor of New Jersey, and had been State Attorney-General, one of the leaders of the Federal Convention, and United States Senator for four years.[2]

Finally, notwithstanding the President's suggestion that the Amendment might now properly be declared adopted, and notwithstanding a resolution later on introduced in Congress, calling on him to proclaim the adoption of this Amendment, if in fact it had been ratified, yet it does not appear that either the President or Congress ever did formally declare the Eleventh Amendment adopted."

[1] Similar prevalence of yellow fever prevented any business at the August, 1794, Term, and the August, 1797, Term, 3 Dallas, 369. In August, 1798 and 1799, yellow fever was again prevalent in Philadelphia. In the *Aurora*, Sept. 31, 1799, it is stated that the offices of the Secretary of State, War, Treasury, Navy, etc., had been removed to Trenton, N. J. By the Act of Feb. 25, 1799, it was provided that: "Whenever in the opinion of the Chief Justice, or in case of his death or inability, of the Senior Associate Justice of the Supreme Court of the United States, a contagious sickness shall render it hazardous to hold the next stated session of the said Court at the seat of the government, it shall be lawful for the Chief or such Associate Justice to issue his order to the Marshal, 'to adjourn the session to another place within the same or an adjoining district.' "

[2] To Paterson, Washington had written, Feb. 20, 1793: "I think it necessary to select a person who is not only professionally qualified to discharge that important trust, but one who is known to the public, and whose conduct meets their approbation. I shall have the satisfaction to believe that our country will be pleased with and benefited by the acquisition."

There is a singular and little known fact regarding this appointment. The nomination was first made to the Senate on Feb. 27, 1793, at a time when, under the Constitution, Paterson was disqualified from holding office, since the office of

At this Term, only two cases were heard, but each was closely connected with vital political issues. The first, *Georgia* v. *Brailsford*, involved another phase of the question of State sovereignty and presented a curious history. Brailsford, an alien and a British creditor, had sued a Georgia citizen in the United States Circuit Court on a debt which the State of Georgia had sequestrated.[1] The State, however, applied to the Circuit Court to be admitted as a party defendant in order to set up its title to the property, and having been refused had filed an original bill in equity in the Supreme Court seeking an injunction against the Circuit Court proceedings. Thus, while complaining in the *Chisholm Case* because it had been made a party to a suit by a British creditor, Georgia was complaining in the *Brailsford Case* because it had *not* been allowed to become a party in another suit by a British creditor. After argument by Alexander J. Dallas against Edmund Randolph, at an earlier Term, the Court had decided that a temporary injunction should issue. It is interesting to note that in this first case in which opinions of the Judges were reported, the first opinion to be expressed had been a dissent by Judge Johnson. The decision had elicited from Randolph a pungent letter in which he expressed to James Madison decidedly uncomplimentary views of the Court: "The State of Georgia applied for an injunction to stop in the

Supreme Court Judge had been created during the period for which Paterson had been elected Senator from New Jersey. When Washington's attention was called to this, he sent a message to the Senate, Feb. 28, 1793, saying: "I was led by a consideration of the qualifications of William Paterson of New Jersey to nominate him as an Associate Justice of the Supreme Court of the United States. It has since occurred that he was a member of the Senate when the law creating that office was passed, and that the time for which he was elected is not yet expired. I think it my duty, therefore, to declare that I deem the nomination to have been null by the Constitution."

[1] See *Samuel Brailsford* v. *James Spalding* in which Judge Iredell had held that the Treaty repealed the State law sequestrating British debts. *Gazette of the United States*, May 16, 1792; *Georgia* v. *Brailsford*, 2 Dallas, 402, 415, 3 Dallas, 1.

Marshal's hands a sum of money which had been recovered in the last Circuit Court by a British subject whose estate had been confiscated. It was granted with a demonstration to me of these facts; that the Premier (Jay) aimed at the cultivation of Southern popularity; that the Professor (Wilson) knows not an iota of equity; that the North Carolinian (Iredell) repented of the first ebullitions of a warm temper; and that it will take a score of years to settle, with such a mixture of Judges, a regular course of chancery."[1] At the next Term in February, 1793, the Court, having decided the *Chisholm Case* against the contentions of Georgia, was evidently reluctant to rule against her a second time; hence on Randolph's motion to dissolve the injunction, while holding that Georgia's claim to the debt was a right to be pursued at common law and not by bill in equity, it decided to continue the injunction until this right might be determined at law in a suit by the State. Accordingly an "amicable action" at law was entered in the Court, and the case was tried before a special jury, in 1794. On the questions of law, the Judges united in the charge, which was delivered by Chief Justice Jay. The jury found in favor of Brailsford; and the State's claim was denied on the ground that a sequestration law did not operate to confiscate the debt or to vest title in it in the State.[2]

[1] *Omitted Chapters of History Disclosed in the Life and Papers of Edmund Randolph* (1888), by Moncure P. Conway, 168, letter of Aug. 12, 1792.

[2] The following account appeared in the *American Daily Advertiser*, Feb. 17, 1794: "On the 4th of Feb., 1794, a special jury was qualified to try the cause, which, during four days, was argued by Mr. Ingersoll and Mr. Dallas for the State of Georgia, and Mr. Bradford, Mr. Tilghman and Mr. Lewis for the defendants. As we understand that a full report of the record and the pleadings is preparing for the press, we shall only add on this occasion the charge of the Court which was delivered by Jay, Chief Justice, on the 7th of February." For Chief Justice Jay's charge in full, see *New York Daily Advertiser*, Feb. 11, 20, 1794. Two other cases were tried by a jury in the Supreme Court — *Oswald* v. *New York* and *Catlin* v. *South Carolina*. See *History of the Supreme Court*, by Hampson L. Carson, 169, note; see also *New Federal Judicial Code*, in *Amer. Law Rev.* (1912), XLVI.

The only other case decided at this February, 1794, Term, *Glass* v. *Sloop Betsy*, was one of supreme importance in the early history of the country; for it called for a judicial decision vital to the maintenance of the policy of neutrality — a policy which the Government had adopted as the only safe course amidst the international complications and internal party dissensions then darkening the pathway of the young Nation. "It is very necessary for us to keep clear of the European combustion, if they will let us," Jefferson had written in May, 1793. "This summer is of immense importance to the future condition of mankind all over the earth, and not a little so to ours." [1] The new doctrines of President Washington's famous Neutrality Proclamation of April 22, 1793 — that great State paper which is now regarded by international law writers as the foundation of the law of neutrality — were at that time the subject of heated opposition; the country was sharply divided into pro-British and pro-French factions, each of which looked with equanimity on breaches of our neutrality by the belligerents; the new French Minister, Genet, relying on American sympathy, was engaged in fitting out privateers in our ports and setting up Prize Courts here for the condemnation of vessels captured by such privateers; State Judges and other officials were in hearty sympathy with Genet's activities; and there were no Federal statutes in existence dealing with the subject. In consequence of these conditions, the problem of the enforcement of the Neutrality Proclamation was a difficult one, unless the Federal Courts should decide that

In *Pennsylvania* v. *Wheeling, etc. Bridge Co.*, 9 How. 647 (1850), Daniels, J., diss., expressed an opinion that the case should go to a jury; the case was a bill in equity brought by the State of Pennsylvania, and the Court referred it to a Commissioner to find the facts.

[1] *Harry Innes Papers MSS*, letter of Jefferson to Innes, May 23, 1793.

they were vested with power in Admiralty to restrain or penalize activities violative of international law. Hence, when the question of the possession of such power by these Courts arose, in June, 1793, in a case in the District Court of the United States in Pennsylvania, the decision was awaited with the utmost anxiety by the President and his Cabinet. Two American neutral vessels captured by French privateers in our territorial waters — *The William* and *The Fanny* — had been libeled by their American owners. Eminent counsel, Peter S. Duponceau and Jared Ingersoll, argued that the Federal Court had no jurisdiction and that under an existing treaty France had the right to bring all prizes into our ports; and they contended that the United States must seek its redress by negotiation and that the Courts must keep clear of all the international complications and "disturbances which agitate Europe."[1] William Rawle, for the American owners, urged that the Court take jurisdiction, saying: "From the well-known spirit of liberty and justice which breathes through all the public acts of France since her revolution, he was persuaded that she would be perfectly satisfied with this equitable mode of settling the business." William Lewis, on the same side, said that "the honor and dignity of the United States are deeply involved in the decision of this case; it involves a violation of the peace of the country, and if, when two powers are at war, one may invade our territory, our commercial intercourse with foreign nations and our tranquility become materially involved. . . . It has been said that this is a cause between the citizens of Great Britain and the citizens of France. It is the

[1] For account of the proceedings, see *General Advertiser*, June 7, 19, 21, 24, 29, 1793; *American Daily Advertiser*, June 17, 24, 1793; *The Diary or Loudun's Register*, June 24, 1793.

cause of America herself, inasmuch as it is the duty of this country to preserve a strict neutrality." To the objections raised that no precedent for the assumption of jurisdiction by a Court of Admiralty could be found, he replied that these privateers had gone further than any one before: "After injuring our trade by watching off our rivers and bays for vessels, after making a capture in our territory, they had added insult to injury and brought the prize to the very seat of government — an act altogether unprecedented for audacity." Lewis and Rawle believe, wrote Alexander Hamilton to Rufus King, "that the District or Admiralty Court will take cognizance of this question. They argue that it would be a great chasm in the law that there should not be some competent judicial authority to do justice between parties in the case of an illegal seizure within our jurisdiction. . . . That though, as a general principle, a Court of a neutral nation will not examine the question of prize or not prize between belligerent powers, yet this principle must except the case of the infraction of the jurisdiction of the neutral power itself. . . . This is their reasoning, and it has much force. The desire of the Executive is to have the point ascertained."[1] To the consternation of the President, Judge Richard Peters decided that the Court was not vested with power to inquire into the legality of the prize. While "anxious for the peace and dignity of my country", he stated that "not considering the Court in this instance the vindicator of the rights of the Nation, I leave in better hands the discussion on the subject of National insult and the remedy for an invasion of territorial rights." The President was unwilling to accept this decision of an inferior Court as final; accordingly, he directed the

[1] *Hamilton*, X, letter of June 15, 1793.

Governor of Pennsylvania to place guards over *The William;* he issued an Executive order that prizes taken by French privateers in violation of neutrality and brought into our ports should be restored to their owners; and to Genet's protest at this action he replied, through Jefferson as Secretary of State, that "an appeal to the Court of last resort" would decide the question finally.[1] Meanwhile, in order to avoid further delay, Washington took the radical step of causing a letter to be sent by Jefferson, addressed to Chief Justice Jay, and asking the Judges of the Supreme Court whether the President might seek their advice on questions of law:

The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the United States. These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the law of the land, and are often presented under circumstances which do not give a cognizance of them to the tribunals of the country. Yet their decision is so little analogous to the ordinary functions of the Executive as to occasion much embarrassment and difficulty to them. The President would, therefore, be much relieved if he found himself free to refer questions of this description to the opinions of the Judges of the Supreme Court of the

[1] See *National Gazette*, June 22, 28, 1793, publishing Judge Peters' decision in full; see *General Advertiser*, July 2, 1793, for long letter as to the President's action; see also *American Daily Advertiser*, Aug. 5, 1793; and as to restoration of prizes, see *Connecticut Journal*, Aug. 28, Sept. 4, 1793; *Massachusetts Mercury*, Sept. 17, 1793.

Writing to Jefferson for his opinion, July 11, 1793, Washington said: "What is to be done in the case of the *Little Sarah* now at Chester? Is the Minister of the French Republic to set the acts of this Government at defiance with impunity? And then threaten the executive with an appeal to the people? What must the world think of such conduct, and of the Government of the United States in submitting to it?" *Washington*, X, 355; *Hamilton*, X, letter to Rufus King, Aug. 13, 1793. See also *General Advertiser*, July 22, 1793, for interesting letter from "Metellus to Juba" regarding the *Little Sarah*.

United States, whose knowledge of the subject would secure us as against errors dangerous to the peace of the United States, and their authority ensure the respect of all parties. He has therefore asked the attendance of such of the Judges as could be collected in time for the occasion, to know, in the first place, their opinion, whether the public may, with propriety, be availed of their advice on these questions. And if they may, to present, for their advice, the abstract questions which have already occurred, or may soon occur, from which they will themselves strike out such as any circumstances might, in their opinion, forbid them to pronounce on.

Hamilton had objected to this reference to the Judges, on the ground that the matter was not within the province of the Judiciary. Washington, however, in deference to the wishes of Jefferson, had decided to take this action, and accordingly Hamilton had framed twenty-nine questions relating to international law, neutrality and the construction of the French and British treaties, which were transmitted with Jefferson's letter for the consideration of the Judges.[1] While the impression was prevalent at that period that the President had the right to seek the opinion of the Judges on questions of law, it is interesting to note that this move on his part was the subject of adverse criticism in the pro-French newspapers, one of which commented as follows: "It is said that the Judges of the United States have been convened to assist the understanding of our Executive on the treaty between France and the United States. It is a little strange that lawyers only

[1] See *Jefferson*, VII, letter of July 18, 1793; *Washington*, X, letter of July 23, 1793; *Washington*, X, 542–543. Twenty-two of these questions are printed in *Hamilton* (Lodge's ed.), IV, 193, 197, note; and see *Advisory Opinions* in *Legal Essays* (1908), by James B. Thayer. It may be noted that Hamilton had found no objection to consulting personally with Jay over such matters, for he had corresponded with him, seeking advice as to the issue of the Neutrality Proclamation; see *Jay*, III, letters of April 9, 11, 1792; also with regard to the necessity of a Presidential proclamation as to the Whiskey Insurrection. *Jay*, III; *Hamilton*, X, letter of Sept. 3, 1792.

should be supposed capable of deciding upon common sense and plain language, for such is the treaty."[1]

The Judges of the Supreme Court, however, confronted with a new and fundamental problem, took time to consider whether they should comply with this request from the Executive. Finally, on August 8, 1793, they replied, declining to give their opinion on these questions of law, and stating with great firmness, though with due deference:[2]

We have considered the previous question stated in a letter written by your direction to us by the Secretary of State, on the 18th of last month regarding the lines of separation, drawn by the Constitution between the three departments of the government. These being in certain respects checks upon each other, and our being Judges of a Court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judi-

[1] *National Gazette*, July 27, 1793, letter signed "Juba."

The *Connecticut Courant*, Aug. 15, 1795, quoted a New York dispatch referring to a report that the President had called the Supreme Court in special session to advise with him: "The Senate is the Council of the Executive, as far as respects our negotiations with foreign nations. The President may ask the opinions of the Judges on points of law, but it does not appear that any special summons has been issued for convening them at this time."

The Trustees of the National Sinking Fund, comprising the Vice-President, the Secretary of State, the Secretary of the Treasury, the Attorney-General and the Chief Justice, asked from Chief Justice Jay an opinion as to the construction of the law, and Jay rendered a written opinion, March 31, 1792. *New York Daily Advertiser*, March 9, 1793.

[2] *Jay*, III, 486; see also *Muskrat* v. *United States* (1911), 219 U. S. 354. Before sending their final reply, Jay and his Associate Judges addressed a preliminary letter to President Washington, July 20, as follows: "The question 'whether the public may, with propriety, be availed of the advice of the Judges on the question alluded to' appears to us to be of much difficulty as well as importance. As it affects the Judicial Department, we feel a reluctance to decide it without the advice and participation of our absent brethren. The occasion which induced our being convened is doubtless urgent; of the degree of that urgency we cannot judge, and consequently cannot propose that the answer to this question be postponed until the sitting of the Supreme Court. We are not only disposed, but desirous, to promote the welfare of our country in every way that may consist with our official duties. We are pleased, sir, with every opportunity of manifesting our respect for you, and are solicitous to do whatever may be in our power to render your administration as easy and agreeable to yourself as it is to our country. If circumstances should forbid further delay, we will immediately resume the consideration of the question and decide it."

cially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly united to the *Executive* departments. We exceedingly regret every event that may cause embarrassment to your Administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision and firmness will surmount every obstacle to the preservation of the rights, peace, and dignity of the United States.

By the firm stand thus taken at so early a stage in the career of the new Government, and by declining to express an opinion except in a case duly litigated before it, the Court established itself as a purely judicial body; and its success in fulfilling its function has followed its adhering to this exclusive method of deciding questions of law and of constitutionality of statutes. "The process is slower, but freer from suspicion of pressure and much less provocative of jealousy, than the submission of broad and emergent political propositions to a judicial body."[1] As De Tocqueville said, the American Judge "is brought into the political arena independently of his own will; he only judges the law because he is obliged to judge a case; the political question which he is called upon to resolve is connected with the interest of the parties and he cannot refuse to decide it without abdicating the duties of his post." Consequently, the decisions of the Court on questions involving matters which have become the subjects of political controversy are much less likely to arouse suspicion and distrust than if the Court exercised the power to decide such questions without litigation and argument by parties having a direct interest in the result of the decision.

[1] *Popular Government* (1885), by Sir Henry Maine, 223; *Democracy in America* (1835), by Alexis de Tocqueville, I, 143; *The American Judiciary* (1905), by Simeon

Before the answer of the Judges had been received, Washington's efforts to maintain neutrality had received a further blow by the outcome of another case involving the neutrality of the country. While the question of the extent of the power of the Federal Admiralty Courts over French prizes was still unsettled, the problem of the effective enforcement of our neutrality in criminal cases in the Federal Courts had given the Government even more concern. Prior to 1794, there were no Federal criminal statutes on the subject, and the important questions were presented: Could a person who violated the law of nations or the provisions of a treaty be punishable criminally in the Federal Courts? Did the common law afford a basis for a criminal indictment in these Courts? These questions had been answered affirmatively by Chief Justice Jay, as early as May 22, 1793, in a charge to the Grand Jury in the Federal Circuit Court at Richmond, and by Judge Wilson, July 22, in a charge to the Grand Jury in the Federal Circuit Court at Philadelphia.[1] On July 27, an indictment was found in Philadelphia, against one Gideon Henfield, charging him with acting as prizemaster on the *Citizen Genet*, a French privateer fitted up and commissioned in the United States and attacking and seizing ships of a nation with which the United States was at peace, in violation of the laws of nations and of the treaties and laws of the United States. The case aroused great excitement, for it was

E. Baldwin, 32–33; *The Supreme Court*, by George P. Costigan, *Yale Law Journ.* (1907), XVI. See also *Dewhurst* v. *Coulthard*, 3 Dallas, 409.

[1] *American Daily Advertiser*, July 25, 26, 1793; *General Advertiser*, July 26, 1793; for account of the case of *United States* v. *Ravara* in which the power of the United States Courts to try a person indicted for a common law crime was again upheld, *ibid.*, July 27, 1793. Even as early as the first Circuit Court held in Massachusetts in 1790, Jay had stated to the Grand Jury that "the objects of your inquiry are all offences committed against the laws of the United States", and "you will recollect that the laws of nations make part of the laws of the Nation." *Independent Chronicle*, May 27, 1790.

the first prosecution of an American citizen for aiding the French,[1] and the Anti-Federalists were loud in their denunciation of the Government. "It is important to have the principle on which Henfield was arrested developed," said the *National Gazette*. "If they were arrested on the strength of the proclamation, the free men of this country have degenerated into subjects. This process . . . by the Executive authority . . . involves a question of the first magnitude to Americans, and that is, whether they are subjects of the United States, or citizens." And again it said: "His arrest . . . is an infringement of those rights which it is presumed every American citizen possesses . . ; it has occasioned serious alarm in the breasts of the citizens in general, who are without the vortex of British influence." It stated that an American citizen entering into the service of belligerent powers put himself beyond the jurisdiction of the United States, and it denied that the English doctrine of inalienable allegiance existed in the United States.[2] "Their papers sounded the alarm," wrote Marshall later, "and it was universally asked 'what law had been offended and under what statute was the indictment supported? Were the American people prepared to give to a proclamation the force of a legislative act, and to submit themselves to the will of the Executive?

[1] In reply to a protest by the French Minister, Genet, Jefferson wrote that the Henfield matter would be examined "by a jury of his countrymen in the presence of Judges of learning and integrity." *Jefferson*, VII, June 1, 1793. There had been a previous arrest of an American citizen, Gideon Olmstead, for serving as an officer on a French privateer in violation of the President's Proclamation; and he had been bound over for indictment in the District Court in North Carolina in July, 1793. *Columbian Centinel*, July 6, 1793.

[2] See *Independent Chronicle*, June 13, 20, 1793; the *New York Daily Advertiser*, another Anti-Federalist paper, reported, July 29, 1793, that the grand jury had indicted "divers persons for having caused sundry vessels in the port of Philadelphia to be armed and equipped in a warlike manner, being an infraction of certain treaties and *a direct violation of the neutrality of the United States declared by the President's Proclamation.*"

But if they were already sunk to a state of degradation, were they punished when the offense was committed, if indeed it could be termed an offense to engage with France combating for liberty against the combined despots of Europe.'" [1] Washington and his Cabinet took great interest in the case; Hamilton drafted an indictment and aided in the trial; Attorney-General Randolph argued the case with the United States Attorney William Rawle. For the prisoner, Peter S. Duponceau, Jared Ingersoll and Thomas Sergeant appeared. Judge Wilson (with whom Judge Iredell and District Judge Peters also sat) charged the jury with great positiveness that Henfield's act, if proved, was punishable in the Federal Court under the law of nations and treaties of the United States, even though Congress had enacted no statute making the act a crime. "This is a case of first importance," said Judge Wilson to the jury. "Upon your verdict the interests of four millions of your fellow citizens may be said to depend. . . . As a citizen of the United States, the defendant was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations," and he pointed out that if citizens could take part in the war on one side, they might on both sides, and that their friends who stayed behind also would not keep the peace, " and so civil war may result." In spite of this charge, and the certainty of the evidence, the jury acquitted Henfield "amidst the acclamations of their fellow citizens." [2] While the result of the pros-

[1] *Life of Washington* (1807), by John Marshall, II, 273.

[2] "It is said the juryman that opposed the acquittal of Gideon Henfield upon his final compliance informed the Bench that he was induced to the verdict because he heard threats made out of doors against anyone who should oppose the acquittal." *Massachusetts Mercury*, Aug. 9, 1793. The *National Gazette* said, Aug. 17, 1793: "The toast of the day in all republican circles at Boston is, 'the virtuous and independent jury of Pennsylvania who acquitted Henfield.' " For account of the trial, see *General Advertiser*, July 30, 31, Aug. 3, 1793; *American Daily Advertiser*, July 3, Aug. 8, 19, 1793; *National Gazette*, Aug. 3, 1793; *The Diary or*

ecution (which they termed Executive persecution) was hailed with rejoicing throughout the pro-French partisan press, it alarmed President Washington, and in view of the ruling by the Court on the law, legislation by Congress seemed imperative for the protection of the Nation's neutrality. Accordingly, he wrote to his Cabinet, August 3, 1793, asking their advice as to the advisability of convening Congress at an earlier date than its regular session. Objection being raised, however, to this course, Washington issued detailed instructions to collectors of customs, through Secretary of the Treasury Hamilton, prescribing rigid enforcement of neutrality for the future. It was just at this crucial period, that the President's policy received a third blow, by the decision in the District Court of the United States in Maryland, in the case of *Glass* v. *Sloop Betsy*, holding that the Federal Admiralty Court had no jurisdiction over French prizes. Again the joy of the pro-French partisans was unbounded. "The Judge in a very learned and elaborate opinion," said a Baltimore dispatch, "unfolded his reasons against the jurisdiction of the Court in a manner that, we hope, will leave our allies to the full enjoyment of their acquisitions, without further molestation, under the treaty of amity and commerce." [1] The Government at once took an appeal to the Supreme Court, and there was thus presented to that

Loudun's Register, Aug. 7, 1793; *New York Daily Advertiser*, Aug. 1, 5, 1793. Judge Wilson's charge was published in full in the *Independent Chronicle*, Aug. 15, 1793; *The Diary or Loudun's Register*, July 26, 1793, and many other papers. In spite of the result in the Henfield Case, the Federal Courts continued to indict persons for violations of neutrality, the indictments being based on common law and the law of nations. See account of three American citizens taken from the French privateer *Roland* in Boston and held for trial in the Circuit Court on charge of "aiding and assisting in manning and fitting out vessels and piratically and feloniously capturing the vessels of nations with whom the United States are at peace." *Connecticut Journal*, Sept. 4, 1793.

[1] *Independent Chronicle*, Sept. 2, 1793; see similar case of Rivers, in Georgia, *American Daily Advertiser*, Dec. 10, 11, 1793.

tribunal, in February, 1794, this important question involving most seriously the attitude of the United States towards its international duties and relations. It would have been easy for the Court, in view of the heated conflict between the British and the French factions, to shrink from the responsibility of decision, and to hold that the question was purely a political one with which the Executive Department alone should deal. Such a course, however, it declined to follow; and, by its decision in *Glass* v. *Sloop Betsy*, 3 Dallas, 6, it met the vital question squarely and conclusively. The case presented the following facts: a vessel and cargo belonging to neutral Swedes and Americans, captured by the French and sent into Baltimore for purpose of adjudication as a prize by the French consul there, was libeled by the neutral owners in the United States District Court; and the question at issue was whether that Court had jurisdiction to determine the legality of capture or to order restitution of a prize brought by a belligerent into our ports. The argument by Edward Tilghman and John Lewis against Peter S. Duponceau lasted for five days, February 8–12, 1794; six days after its close, the Court "informed the counsel, that besides the question of jurisdiction as to the District Court, another question fairly arose upon the record, whether any foreign nation had a right, without the positive stipulation of a treaty, to establish in this country, an admiralty jurisdiction for taking cognizance of prizes captured on the high seas, by its subjects or citizens, from its enemies. Though this question had not been agitated, the Court deemed it of great public importance to be decided; and meaning to decide it, they declared a desire to hear it discussed." Since the counsel for appellants, however, stated that they "did not conceive themselves inter-

ested in the point, and that the French Minister had given no instructions for arguing it", the Court at once proceeded to render a decision, disposing of both questions. It upheld the jurisdiction of the District Court to pass upon the legality of prizes brought into our ports; and it made the important announcement that "the admiralty jurisdiction which has been exercised in the United States by the consuls of France" was not warranted and "is not of right."[1]

By this decision, belligerent foreign nations were formally notified that the legal ownership of prizes brought into our ports, the legality of their capture and the legal effect of breaches of our neutrality by the captors were all matters which might be tested in the Courts of the United States and over which those Courts had full jurisdiction. No decision of the Court ever did more to vindicate our international rights, to establish respect amongst other nations for the sovereignty of this country, and to keep the United States out of international complications. As was said by Timothy Pickering in a letter of January 16, 1797, to Pinckney, United States Minister to France, in replying to complaints made by the French Minister, Adet, regarding the case of the *Betsy* and of other captures made by illegally armed French privateers, "the most effectual means of defeating their unlawful practices was the seizure of their prizes when brought within our jurisdiction. . . . No examination of such prizes had been attempted by our Government or tribunals unless on clear evidence or reasonable presumption that the captures were made in circumstances which amounted to a violation of our sovereignty and territorial rights. . . . No one will find sufficient ground to impeach the

[1] See *The Defence*, by "Camillus", *New York Daily Advertiser*, Sept. 23, 1795. The opinion of the Court was published very fully in most of the Philadelphia newspapers and in most of the other leading contemporary newspapers.

discernment or integrity of our Courts."[1] How vital to the preservation of peaceful relations this decision became was seen during the troublous years from 1816 to 1826, when the Court had occasion to pass upon constant violations of our neutrality in connection with the Spanish-American revolutions.

A rumor at this time that a vacancy was about to occur on the Court, to be filled by the appointment of Judge Nathaniel Pendleton of Georgia, evoked from Washington a letter to Edmund Pendleton which gave an interesting description of the President's methods in making appointments. After denying the vacancy he said: "Whenever one does happen, it is highly probable that a geographical arrangement will have some attention. . . . Although I do at all times make the best inquiries my opportunities afford to come at the fittest characters for officers, where *my own* knowledge does not give a *decided* preference . . . no one knows my ultimate determination, until the moment arrives when the nomination is to be laid before the Senate. My resolution not to create an expection (*sic*) which hereafter might embarrass my own conduct (by such a commitment to anyone as might subject me to the charge of deception) is co-eval with my inauguration, and in no instance have I departed from it. The truth is, I never reply to any application for office by letters, nor verbally, except to express the foregoing sentiments, lest something might be drawn from a civil answer that was not intended."[2]

This February session of 1794 was the last in which Jay sat as Chief Justice, for in the succeeding spring,

[1] See *4th Cong., 2d Sess., App.*, 2713. The cases complained of were *Glass* v. *Betsy*, *Talbot* v. *Jansen*, *Guyer* v. *Michael*, *United States* v. *Vengeance*, *The Cassius* (all of which appear in *Dallas Reports*), and *The Privateer General Laveaux*, *The Hawk*, *The Caesar* and *Favorite* (which are not reported in Dallas).

[2] *Washington Papers MSS*, letter of March 17, 1799.

he was appointed by Washington as Special Ambassador to England to negotiate a treaty of settlement of the controversies then pending. The choice of a member of the Court for such a mission was not received favorably by the Senate; but after a three days' debate, in the course of which a resolution was offered that "to permit Judges of the Supreme Court to hold at the same time any other office of employment emanating from and holden at the pleasure of the Executive is contrary to the spirit of the Constitution, and as tending to expose them to the influence of the Executive, is mischievous and impolitic", the nomination was finally confirmed by a vote of 18 to 8, on April 19, 1794. A letter from Madison to Jefferson illustrates the animadversions aroused: "The appointment of (Hamilton) as Envoy Extry was likely to produce such a sensation that, to his great mortification, he was laid aside and Jay named in his place. The appointment of the latter would have been difficult in the Senate, but for some adventitious causes. There were 10 votes against him in one form of the opposition, and 8 on the direct question. As a resignation of his Judiciary character might, for anything known to the Senate, have been intended to follow his acceptance of the Ex. trust, the ground of incompatibility could not support the objections, which, since it has appeared that such a resignation was no part of the arrangement, are beginning to be pressed in the newspapers. If animadversions are undertaken by skillful hands, there is no measure of the Ex. administration, perhaps, that will be found more severely vulnerable." The opposition to Jay's appointment was due not merely to his judicial status, but to his supposed English proclivities and to his lukewarm views on American rights in the navigation of the Mississippi River — a sub-

ject on which the Western Country was deeply aroused. "Will you not hear with surprise that John Jay, Chief Justice of the United States, has received this appointment?" wrote Senator Brown of Kentucky to Jefferson's friend, Judge Harry Innes of the United States District Court. "To you it is unnecessary to remark on the objections arising from the Constitution to an appointment which blends the functions of the Judiciary and Executive, or which renders the Judiciary dependent upon and subservient to the views of the Executive, and which unites in one person offices incompatible with each other. Nor need I observe upon his conduct in relation to Mississippi negotiation, or inform you that, when Secretary of State under the old Government and a Chief Justice under the present, he has expressly committed himself in derogation of the claim of the United States upon the subject of the unexecuted clauses of the Treaty, detention of the Western Posts and interest upon British debts. . . . This appointment gives room for great discontents, especially as his political opinions are adverse to the French Revolution and, as supposed by many, to Republican Government also. All efforts in the Senate to defeat the nomination were ineffectual." "There was opposition to the appointment echoed from one end of the continent to the other," said an Anti-Federalist Congressman in debate, later. "The example was dangerous, it put the Judges under the influence of the Executive, and although the prospect of an honorary appointment within the gift of the President was remote, yet it might influence and lessen their independence." And a prominent Federalist also said, later: "This was breaking in on a fundamental principle, that is, that you ought to insulate and cut off a Judge from all extraneous inducements and expecta-

tions; never present him the jora of promotion; for no influence is more powerful in the human mind than hope — it will, in time, cause some Judges to lay themselves out for presidential favor, and when questions of State occur, this will greatly affect the public confidence in them." [1]

Jay himself was not anxious to accept, since the work of the Court was now becoming more engrossing, but he finally decided to comply with the President's wishes and to assume the new task, and accordingly he sailed from New York soon after the close of the Term, in March, 1794.

At the February Term in 1795, but four cases came before the Court. In one, *United States* v. *Judge Lawrence*, 3 Dallas, 42, the relations of this country with France were again involved, when the French Vice-consul, acting in reliance on a treaty, demanded from United States District Judge Lawrence, a warrant for arrest of the captain of a French frigate who had abandoned his ship.[2] Upon failure to obtain the warrant, the Vice-consul persuaded the President to order the Attorney-General to sue out a mandamus. In view of the friction between the two countries at this time arising out of the obnoxious behavior of the French diplomatic officials in the United States, President Washington's scrupulous observance of treaty provisions was well illustrated in the opening argument of Attorney-General Bradford. Acknowledging

[1] *Madison*, VI, letter of April 28, 1794; *Harry Innes Papers MSS*, letter of John Brown, April 18, 1794. See also *King*, I, 521–522, diary, April 17, 18, 20, 1794; speech of Colhoun of South Carolina in the debate on the Judiciary Bill in 1802, *7th Cong., 1st Sess.*; *Sketch of the Political Profile of Three Presidents*, by Joseph Hamilton Daviess (1807), see *Quarterly Publication of the Historical and Philosophical Society of Ohio* (1917), XII. See also an attack on the Jay appointment as "an express violation of our Constitution." *Independent Chronicle*, May 25, 1795; *ibid.*, April 28, May 5, 12, 19, 29, 1794; *King*, I, 521.

[2] As to this case, see especially letter of Attorney-General Bradford to the Secretary of State, March 21, 1795, *Ops. Attys.-Gen.*, I, 55.

that "the Executive had no inclination to press upon the Court any particular construction of the Article on which his motion was founded", nevertheless, "as it is the wish of our government to preserve the purest faith with all nations, the President could not avoid paying the highest respect, and the promptest attention to the representation of the Minister of France, who conceived that the decision of the District Judge involved an infraction of the conventional rights of his Republic. . . . The President, therefore, introduces the question for the consideration of the Court, in order to insure a punctual execution of the laws; and, at the same time, to manifest to the world the solicitude of our government to preserve its faith, and to cultivate the friendship and respect of other nations." The Court, however, held that it had no power "to compel a Judge to decide according to the dictates of any judgment but his own", and that, irrespective of its views as to the proper construction of the treaty, mandamus was not a proper remedy in such a case.

In the other case of importance, *Penhallow* v. *Doane's Admrs.*, 3 Dallas, 54, a question which had been pending in the Courts for eighteen years, and which had been the source of bitter political conflict, was finally settled — the right of the Federal Circuit Court to carry into effect decrees of the old Prize Court of Appeals which existed under the Articles of Confederation. The State of New Hampshire had long denied the authority of the latter Court; and the assumption of jurisdiction by the Circuit Court in this case, and its overthrow of long-settled decrees of the State Courts, had been hotly resented. Formal resolutions of remonstrance had twice been adopted by the New Hampshire Legislature, in February, 1794, and January, 1795, in which violation of State independence

and an unwarrantable encroachment by the United States Courts were charged, "annihilating all the power of the States, and reducing this extensive and flourishing country to one domination." [1] The case was argued by Attorney-General Bradford and Jared Ingersoll against Samuel Dexter, William Tilghman and John Lewis, for eleven days (February 6–17). A week later, February 24, the Court gave its decision upholding the jurisdiction of the Federal tribunals, and thus deciding the case in favor of a party against whom the Courts of New Hampshire had twice rendered a decision. It elicited from a Federalist newspaper in that State a heated criticism, in the course of which it spoke of the case as having "completely annihilated the sovereignty of New Hampshire." [2]

[1] See *State Documents on Federal Relations* (1911), by Herman V. Ames.

[2] *New Hampshire Gazette*, May 26, Sept. 22, 29, 1795; see *Independent Chronicle*, June 1, 1795; *Salem Gazette*, May 26, 1795; *General Advertiser*, June 9, 1795. Jeremiah Smith wrote to John T. Gilman, Dec. 16, 1795: "That the Federal Government is a foreign one, that its administration and its measures are to be viewed through the medium of apprehension and jealousy are sentiments cherished by many in high office in some of the States. They are sentiments no less false than pernicious." *Life of Jeremiah Smith* (1845), by John H. Morison.

NOTE. In a letter from George Morgan to Alexander McKee, Feb. 1793 (*Pickering Papers MSS*, XLI, 114), describing the *Chisholm Case*, it is said: "No counsel appearing on behalf of the State, the Bench expressed a desire to the Gentlemen of the Bar that, if any of them held the negative of the question, they would speak, and that the Bench would be glad to hear them upon it. None offering, the Chief Justice, after a proper pause, expressed a wish and offer of whatever time should be required by any gentleman to prepare himself; but this was also declined."

The House Resolution of Feb. 19, 1793, for a Constitutional Amendment after the *Chisholm Case* (p. 101, *supra*) does not appear in the *Annals of Congress* but may be found in *Independent Chronicle*, March 7, 1793; see also the proceedings of the House, March 4, 1794, on the Senate Amendment (*ibid.*, March 20, 1794), when Boudinot proposed to qualify the Amendment by a condition that the States should make provision for attainment of justice in their State Courts.

It is stated in *Charleston City Gazette*, March 21, 1793, that *Chisholm* v. *Georgia* was "an action instituted in the United States Circuit Court in Georgia and a verdict obtained on behalf of the State, but removed by a writ of demurrer to the Supreme Court."

CHAPTER THREE

CHIEF JUSTICES RUTLEDGE AND ELLSWORTH

1795–1800

BEFORE the Court convened for its next Term in August, 1795, events had occurred which powerfully affected its future history. John Jay had concluded his noted treaty with England, and had returned to this country in order to become a candidate for Governor of New York. His return and his candidacy were the subjects of an interesting letter addressed to him by his associate, Judge Cushing: "What the treaty is has not come to us with authenticity; but whatever it be, in its beginning, middle or end, you must expect to be mauled by the sons of bluntness — one of the kinds of reward which good men have for their patriotism. Peace and American interests are not the objects with some." [1] On June 29, 1795, having been elected as Governor, Jay had resigned as Chief Justice of the United States.[2] Washington, who had been notified

[1] *Jay*, IV, letter of June 18, 1795.

[2] *Washington*, XI, letter of Jay, June 29, 1795. "The enclosed contains my resignation of the office of Chief Justice. I cannot quit it, without again expressing to you my acknowledgments for the honor you conferred upon me by that appointment and for the repeated marks of confidence and attention for which I am indebted to you. It gives me pleasure to recollect and reflect on these circumstances, to endulge the most sincere wishes for your health and happiness and to assure you of the perfect respect, esteem and attachment with which I am, dear sir, your obliged and affectionate friend and servant." Washington replied, July 2, that he received the resignation "with sincere regret. To the obliging sentiments you have expressed for me in your private letter which accompanied, I sincerely thank you. In whatever line you may walk, my best wishes will always accompany you. They will particularly do so on the theatre you are about to enter, which I sincerely wish may be as smooth, easy and happy as it is honorable."

James Iredell wrote, July 2: "I am told that he did not send his resignation of Chief Justice till two or three days since the Senate broke up. . . . Whatever

in advance of Jay's intention, had endeavored to obtain acceptance of the position by Alexander Hamilton, pointing out to him through a letter written by Attorney-General William Bradford, "the immense importance of confiding that large trust to one who was not to be scared by popular clamor or warped by feeble-minded prejudices." [1] Hamilton, however, declined to accept the appointment, having but recently resigned as Secretary of the Treasury, and being anxious to renew his law practice and political activities in New York.

Meanwhile, Washington's close friend, James McHenry of Baltimore, recommended for any vacancy the appointment of Samuel Chase, then Chief Justice of the General Court of Maryland. Chase had been one of the foremost of the early patriots, "the torch that lighted up the Revolutionary flame", and was one of the ablest lawyers of the State. He was, however, a man of strong passions and prejudices and had been slightly implicated in certain contractors' frauds which his enemies had greatly exaggerated. McHenry, though not an intimate friend of Chase, urged, nevertheless, that the recognition of his long, patriotic services would have an excellent effect upon the country:

> Among the inducements I feel for presenting his name on this occasion is his general conduct since the adoption of our government and the sense I entertain of the part he bore in the revolutionary efforts of a long and trying crisis. You know that his services and abilities were of much use to the cause during that period, sometimes by the measures

were his reasons, I am persuaded it was utterly unjustifiable. The President may, himself, make a temporary appointment, but it is not much to be expected, I fear, as few gentlemen would accept under the circumstances." William Plumer wrote to Jeremiah Smith, June 30, 1795, of Jay's "preëminent virtue" and said that his appointment as Governor "removes the complaint against the Administration of appointing a man to form a treaty who, from his office of Judge, must afterwards expound and execute it. Who will succeed him as Chief Justice in the Court?" *Plumer Papers MSS.*

[1] *History of the Republic* (1860), by John C. Hamilton, VI, 253.

he proposed or had influence to get adopted, and sometimes by the steady opposition he gave to the intrigues raised against yourself; and that if some of his conduct procured him enemies, whatever might have been exceptionable in it was greatly exaggerated at the moment by the zeal of patriotism which makes no allowance for human situations, and afterwards by persons who seem to me to have been always more intent upon removing obstructions to their own advancement than in promoting the public good or doing justice to the merits of competitors. Your experience has long since enabled you to form a just estimate in such cases, and to distinguish between a man's real character and the representation made of it during the fermentation of a party or by those who, approaching your councils, may have a special interest in the continuance of its obscuration. In this respect, the public has done Mr. Chase justice, with the exception of a few men who seem determined to pursue him to old age with a rancour, which, in my eyes, no political quarrel can excuse or honorable ambition justify. In making this allusion, I do not mean, I assure you, Mr. Carroll, whose sentiments of Mr. Chase, I have reason to think, correspond pretty much with my own, as mine does, I am persuaded, with most persons in the State of influence and discernment. It is, Sir, after having weighed all these circumstances since our conversation respecting him, after having reflected upon the good he has done and the good that he may still do; after having debated within myself whether his political or other errors (which exist no longer) have been of such a cast and magnitude as to be a perpetual bar to his holding any office under the United States, after having considered the impressions which an appearance of neglect is apt to produce in minds constructed like his, that I have thought it a duty to mention him as a subject of consideration for present or future attention. . . . I need not tell you that, to his professional knowledge, he subjoins a very valuable stock of political science and information, but it may be proper to observe that he has discharged the office which he fills without the shadow of imputation upon the integrity of his decisions.[1]

[1] *Washington Papers MSS*, letter of June 14, 1795. This letter has apparently never been published. It is to be noted that Chase had already applied to Wash-

Before Washington took any further action, however, he received an extraordinarily interesting letter from John Rutledge of South Carolina, one of his first appointees on the Court, who had early resigned to accept an appointment as Chief Justice of his State.[1]

Finding that Mr. Jay is elected Governor of New York and presuming that he will accept the office, I take the liberty of intimating to you *privately* that, if he shall, I have no objection to take the place which he holds, if you think me as fit as any other person and have not made choice of one to succeed him, in either of which cases I could not expect nor would I wish for it. Several of my friends were displeased at my accepting the office of Associate Judge (altho the senior) of the Supreme Court of the United States, conceiving (as I thought, very justly) that my pretensions to the office of Chief Justice were at least equal to Mr. Jay's in point of law-knowledge, with the additional weight of much longer experience and much greater practice. I was not, however, so partial to myself as not to think that you had very sufficient reason for preferring him to any other, tho I certainly would not have taken the commission, but for your very friendly and polite letter which accompanied it. When I resigned it, I fully explained to you the causes which induced me to accept the office which I now hold. This, I discharge with ease to myself and satisfaction to my fellow citizens. But when the office of Chief Justice of the United States becomes vacant, I feel that the duty which I owe to my children should impel me to accept it, if offered, tho more arduous and troublesome than my present station, because more respectable and honorable. I have held many posts of high rank and great importance and have been under the necessity of refusing others; but they were offered spontaneously and handsomely. I have reason to believe that I discharged all that I held with fidelity and honour. I never sollicited a place, nor do I mean this letter as an application. It is intended merely to apprise you of what I would do if selected, and this I do, on an idea

ington for an appointment under the Federal Government. See letter of Chase, July 19, 1794, in Library of Congress.

[1] *Washington Papers MSS*, letter of June 12, 1795.

that you may probably have concluded from the resignation of my Continental commission that it was my determination to remain always at home. I ask pardon for taking up so much of your time (which is always precious) and will intrude no longer than to request, if an appointment has taken place or the nomination of any person only settled in your mind, that the contents of this letter may be forever unknown (as they are at present) to any but yourself and to assure you that, if after reading this letter, you shall nominate another in preference to me, circumstances can never lessen the respectful and great esteem and veneration which I have always possessed and always shall have for your person and character. That God may long continue to preserve in perfect health of mind and body a life so inestimable as yours, not only to this country, but I may add, to the liberties of mankind in general, is the sincere and fervent wish and hope of, dear sir, your sincere and affectionate, obliged and obedient servant.

On receipt of this letter, Washington made an immediate reply, July 1, stating that it gave him "much pleasure" in tendering to Rutledge the appointment as Chief Justice, and that he had directed the Secretary of State to make out his commission (the Senate having then adjourned) and

to express to you my wish that it may be convenient and agreeable to you to accept it — to intimate in that case my desire and the advantages that would attend your being in this city the first Monday in August (at which time the next session of the Supreme Court will commence) and to inform you that your commission as Chief Justice will take date on this day (July the first when Mr. Jay's will cease) but that it would be detained here, to be presented to you on your arrival. I shall only add that the Secretary will write to you by post and by a water conveyance also if there be any vessel in this harbor which will sail for Charleston in a few days.

The appointment, though an eminently fit one, came as a complete surprise to the public and to the Associate

Judges of the Court who had apparently assumed that the choice of a Chief Justice would be made from among their number.[1] "It seems to have been intended merely to establish a precedent against the descent of that office by seniority and to keep five mouths always gaping for one sugar plumb," wrote Thomas Jefferson to James Monroe.[2] Shortly before Rutledge's arrival in Philadelphia to attend the August Term of the Court, however, facts became known as to his political views which completely altered the situation and aroused the most bitter and determined opposition to his appointment. The Jay Treaty had been ratified by the Senate on June 24, and owing to the violent revolt against its terms by the anti-British faction in this country, support of the treaty was regarded by Washington's adherents as the touchstone of true Federalism.[3] When, therefore, towards the end of July on the arrival of Charleston newspapers at the North, the Federalists were informed that the new Chief Justice, on July 16, before receipt of his appointment, had delivered an address violently attacking the Jay Treaty, they were surprised and indignant.[4] Their resentment at Rutledge's action was further increased by the false reports as to his speech which were circulated in the Federalist

[1] Marshall, in his *Life of Washington* (1807), II, 297, wrote of Rutledge as a "gentleman of great talents and decision."

[2] *Jefferson*, VIII, letter of March 2, 1796.

[3] The Jay Treaty was signed, Nov. 19, 1794; received by the President, March 7, 1795; received by the Senate when it convened, June 8; ratified conditionally, June 24; published by the *Aurora*, July 1, from the copy of Senator Stevens Thomson Mason; signed by the President, Aug. 18. The Senate adjourned, June 26, 1795.

[4] The *Massachusetts Mercury*, Aug. 4, 1795, stated: "The Charleston papers here received mention very positively Judge Rutledge's appointment to the office of Chief Justice of the United States. His commission, they say, reached him by Post on the 24th inst. (about a week after his warm speech on the demerits of the Treaty), but must have left Philadelphia about a fortnight before the City Meeting took place in Charleston. The Charleston papers also mention that to the southward to them the Democrats are burning Mr. Jay in effigy." Rutledge sailed from Charleston, July 31, for Baltimore and arrived in Philadelphia, Aug. 11; *Massachusetts Spy*, Aug. 19, 1795; *Connecticut Courant*, Aug. 17, 1795.

papers of the North. Though the meeting had been held in St. Michael's Church in Charleston and presided over by an eminent State Judge, the statement was made in a leading partisan paper in Boston (and widely copied) that Rutledge had appeared "mounted upon the head of a hogshead, haranguing a mob assembled to reprobate the treaty and insult the Executive of the Union . . . insinuating that Mr. Jay and the Senate were fools or knaves, duped by British sophistry or bribed by British gold . . . prostituting the dearest rights of freemen and laying them at the feet of royalty." Other papers said that he had declared "he had rather the President should die (dearly as he loved him) than he should sign that treaty." [1] While the accuracy of these quotations was denied by Rutledge's adherents, the denial had little effect upon the Federalists, for they were determined that no man who opposed the treaty should be confirmed in office.[2] Edmund Randolph, the Secretary of State, wrote from Philadelphia to Washington at Mount Vernon, July 29: "The newspapers present all intelligence which has reached me relative to the treaty. *Dunlap's* of yesterday morning conveys the proceedings at Charleston. The conduct of the intended Chief Justice is so extraordinary that Mr. Wolcott and Col. Pickering conceive it to be a proof of the imputation of insanity. By calculating dates, it would seem to have taken place after my letter tendering the office to him was received, tho he has not acknowledged it." Five days later, Randolph wrote: "No answer has been received from Mr. Rutledge; but

[1] *Columbian Centinel*, Aug. 26, 1795; *Farmer's Weekly Museum*, Aug. 11, 1795, quoting a Connecticut paper. The *Columbian Centinel*, Aug. 25, 1795, said: "The report of what Mr. Rutledge said on the Treaty is bottomed on the accuracy of the Jacobin papers of Charleston." The speech was published in the *Charleston City Gazette*, July 17, 1795.

[2] *Lives and Times of the Chief Justices* (1858), by Henry Flanders; *Lives, Times and Judicial Services of the Chief Justices* (1854), by George Van Santvoord.

the reports of his . . . puerility and extravagances together with a variety of indecorums and imprudencies multiply." Attorney-General Bradford wrote to Alexander Hamilton, August 4: "The crazy speech of Mr. Rutledge, joined to certain information that he is daily sinking into debility of mind and body, will probably prevent him receiving the appointment. . . . But should he come to Philadelphia for that purpose, as he has been invited to do, and especially if he should resign his present office, the embarrassment of the President will be extreme; but if he is disordered in mind and in the manner that I am informed he is — there can be but one course of prudence." [1] Timothy Pickering wrote to Washington, July 31: "The Supreme Court is to sit here next week, and perhaps the gentleman named for Chief Justice may arrive. Private information, as well as publications of his recent conduct, have fixed my opinion that the commission intended for him ought to be withheld." Oliver Wolcott wrote to Alexander Hamilton, July 28: "Everything is conducted in a mysterious and strange manner by a certain character here, and to my astonishment, I am recently informed that Mr. Rutledge has had a tender of the office of Chief Justice. By the favor of Heaven, the commission is not issued, and now I presume it will not be, but how near ruin and disgrace has the country been! Cannot you come and attend the Supreme Court for a few days next week? A bed at my house is at your command." Two days later, he wrote of Rutledge as "a driveller and fool." "Many of the warmest advocates of the present

[1] *Washington Papers MSS*, letters of Randolph, July 29, Aug. 5, 1789, *Hamilton Papers MSS*, letter of Bradford, Aug. 4, 1798; *Pickering Papers MSS;* letter of Pickering of July 31, 1795; letter of Higginson, Aug. 29, 1795; *Hamilton* (J. C. Hamilton's ed.), VI, letters of Wolcott of July 28, 30, 1795; see also *Administration of Washington and Adams* (1846), by George Gibbs, I; *History of the Republic* (1860), by John C. Hamilton, VI; *New Hampshire Gazette*, Aug. 4, 1795.

measures are hurt by Mr. Rutledge's appointment and are unable to account for it," wrote Chauncey Goodrich, "but impute it to want of information of his hostility to the Government, or some hidden cause which justified the measure. We shall be loth to find faction is to be courted at so great a sacrifice of consistency." Oliver Ellsworth (then a Senator, and soon to become Rutledge's successor) wrote more temperately to Wolcott, that "if the evil is without remedy, we must, as in other cases, make the best of it." Stephen Higginson wrote to Timothy Pickering: "I presume he never will receive a commission. It would be an unfortunate thing for the public, as well as for himself, since with the present public opinion as to his conduct and character, he can never have the confidence of the people, nor be confirmed by the President and Senate at the next session of Congress." "No man in the habit of thinking well, either of Mr. Rutledge's head or heart but must have felt at reading the passages of his speech, which have been published, pain, surprise and mortification," wrote Alexander Hamilton. The sensation which the address created testified very strongly to the importance which the country attached to Rutledge's opinion; but the Federalist resentment was further increased by the false and exaggerated reports which were given wide currency in the newspapers. The leading Federalist paper, the *Columbian Centinel* of Boston, published a long and virulent attack on Rutledge (which was widely republished), stating that he could not pay his debts, assailing his private character as well as his political views, and lamenting that "though the President's motives, however, cannot be questioned; everyone knows and confesses his integrity and zeal to do right, but he cannot know every man in the United States and the information he got from others cannot always be relied

upon." [1] On the other hand, a warm defense of Rutledge was made by the *Salem Gazette*, which termed this attack, "more licentious than anything which the pen of faction has yet produced"; and a prominent South Carolinian wrote to the *Centinel* that its charges were "audacious indecencies and untruths." . . . "If there is one man in the United States fit for the office of Chief Justice, Mr. Rutledge is that man. His legal abilities are generally admitted by the learned of the Bar to be without superiority in the Union. . . . His integrity is known in Charleston and the State. . . . His private moral character defies the tongue of calumny." [2]

Meanwhile, amid this storm of objurgation, Rutledge had arrived in Philadelphia and, after taking the oath of office on August 12, 1795, had assumed his seat upon the Court for the Term then just beginning.[3] At this session, only two cases were decided. In *Talbot* v. *Jansen*, 3 Dallas, 133, elaborately argued by Jared Ingersoll, Alexander J. Dallas and Peter S. Duponceau against Edward Tilghman, John Lewis and Jacob Read of South Carolina, the restitution was awarded of a prize captured by a French privateer illegally fitted out in our ports, and the Court held that no foreign power had a legal right to issue commissions in this country. The complicated question as to right of National expa-

[1] Letter of "A Real Republican", in *Columbian Centinel*, Aug. 26, 1795; see also *Connecticut Courant*, Sept. 2, 14, 1795. The letter stated that the position of Chief Justice is "too important and dignified for a character not very far above mediocrity. To fill that station with advantage to the public, and with reputation to himself, a man must be eminent for his talents and integrity, for a dignified reserve, and a deliberate investigation, before he forms, much less avows, an opinion. He should be conspicuous for his love of justice in his private dealings and in his official conduct; for if anything can be discovered in either that suggests even a doubt on this point, he must lack the confidence and respect of the people, his usefulness and his reputation are gone forever."

[2] *Salem Gazette*, Sept. 1, 1795; *Columbian Centinel*, Sept. 12, 1795.

[3] Judge James Iredell wrote, August 13: "Mr. Rutledge (my old friend) has arrived and yesterday took his seat. . . . Although I lament his intemperate expressions with regard to the Treaty, yet altogether no man would have been personally more agreeable to me."

triation was considered but not decided; but Judge Paterson laid down with much firmness the doctrine that, whatever right a man might possess to renounce his State citizenship under the provisions of a State statute, no State could by legislation effect renunciation of United States citizenship; and he stated with concise eloquence the complications of the new system of government, in unfolding which during the subsequent years the Court was to play so large a part: "We have sovereignties moving within a sovereignty. Of course there is complexity and difficulty in the system, which requires a penetrating eye fully to explore, and steady and masterly hands to keep in unison and order. A slight collision may disturb the harmony of the parts and endanger the machinery of the whole." [1] In *United States* v. *Richard Peters*, 3 Dallas, 121, on a motion for a writ of prohibition to the United States District Judge in Pennsylvania, to restrain him from entertaining a libel against a French privateer, *The Cassius*, the Court again showed how clear was its disposition to dispense even-handed justice to France, in spite of the bitter attacks launched against it by the French sympathizers. Since *The Cassius* was an armed vessel owned by the French Republic, and not a privateer, the Court held that, even though she was illegally fitted out in the United States, she could not be libeled in our Courts, and that the property of a sovereign and independent nation must be held sacred from judicial seizure.[2]

When the Term ended, Rutledge left Philadelphia to

[1] Of the extreme length of argument in this case, Judge Iredell wrote to Simeon Baldwin, Aug. 18, 1795: "We have been so incessantly employed in business in the Supreme Court that it has been scarcely possible for us to attend to anything else. One cause began on the 6th inst. and is not yet ended and one lawyer spoke three days." *Life and Letters of Simeon Baldwin* (1919), by Simeon E. Baldwin. It may be noted that the decision was given on August 22, four days after the date of Iredell's letter and therefore within four days after the close of argument.

[2] See also *Ketland* v. *The Cassius*, 2 Dallas, 365.

enter upon his Circuit Court duty; but he was destined never to return to the Supreme Court, for the Federalists were fixed in their determination to punish him. Nevertheless, in spite of the protests from his party associates, President Washington, knowing the true character of the man and magnanimous enough to overlook this opposition to his policy by his appointee, let it be known that Rutledge's name would be sent to the Senate when it met; and strong efforts were made by Rutledge's Federalist friends in the South to secure his confirmation. "By the accounts from the Northward, I find that the enemies of the Government are making every possible exertion to do mischief," wrote Ralph Izard. "They are in hopes that the Senate will not confirm the nomination of Mr. Rutledge as Chief Justice, and if so, will immediately raise a clamor and endeavor to ascribe the rejection to party. I most sincerely hope that the Senate will agree to the nomination, and that the Anarchists may be disappointed. . . . I am of opinion that no man in the United States would execute the office of Chief Justice with more ability and integrity than he would. I hope, therefore, you will make every possible exertion on the subject with your friends in the Senate."[1] The Federalists of the North, however, remained unmoved either by Washington's wishes or by the arguments of Rutledge's friends. "The virtuous motives which have induced the treating with regard, men who avow and act upon principles inconsistent with the preservation of order, to influence

[1] *Charleston Year Book* (1886), Appendix, letter of Ralph Izard to Senator Jacob Read of South Carolina, Nov. 17, 1795. Izard referred also to Rutledge's mental condition as follows: "No man could be more afflicted than I was at the part Mr. Rutledge took in opposition to the treaty. I am sure he is now very sorry for it himself. After the death of his wife, his mind was frequently so much deranged as to be in a great measure deprived of his senses; and I am persuaded he was in that situation when the treaty was under consideration. I have frequently been in company with him since his return and find him totally altered."

them to a more just conduct, have been and will be ineffectual," wrote Oliver Wolcott. "I hope, therefore, however disagreeable it may be to imply an error of judgment in the President in appointing Mr. Rutledge, that he will not be confirmed in his office." [1] Moreover, before the Senate convened on December 16, 1795, another ground for rejection of the nomination had arisen, when it became generally known that Rutledge was suffering from intermittent attacks of mental derangement which might interfere with the performance of his judicial duties. Referring to this possibility, Alexander Hamilton wrote to Rufus King, Senator from New York, who had asked advice on the question of confirmation: "It is now, and, in certain probable events, will still more be of infinite consequence that our Judiciary should be well composed," and he advised careful inquiry as to Rutledge's qualifications, saying: "The subject is truly a perplexing one; my mind has several times fluctuated. If there was nothing in the case but his imprudent sally upon a certain occasion, I should think the reasons for letting him pass would outweigh those for opposing his passage. But if it be really true that he is sottish, or that his mind is otherwise deranged, or that he has exposed himself by improper conduct in pecuniary transactions, the bias of my judgment would be to negative. And as to the fact, I would satisfy myself by careful inquiry of persons of character who may have had an opportunity of knowing." [2]

[1] *Administration of Washington and Adams* (1846), by George Gibbs, I, letter of Nov. 23, 1795.

[2] *Hamilton*, X, letter of Dec. 14, 1795. As early as Aug. 4, 1795, Attorney-General Bradford had written to Alexander Hamilton that Rutledge's mind was disordered. The *Farmer's Weekly Museum*, Feb. 2, 1796, stated that a letter to Philadelphia from a gentleman in Charleston, Dec. 31, 1795, stated that Rutledge, on Dec. 26, attempted to drown himself: "It is said he has discovered symptoms of derangement for some weeks past."

The excited political situation, however, was such that irrespective of Rutledge's mental condition his rejection by the Senate was certain, and it was accomplished by a vote of ten to fourteen, as soon as that body convened.[1] "This is as it should be," said the *Columbian Centinel*, "and what he ought to have expected, after the impudent and virulent attack he made on their characters. . . . The President, having appointed him *ad interim* before he knew of his late proceeding, was of necessity obliged to put him in nomination. But since it has been known how passionately he arraigned a measure before he had time to consider, or perhaps before he read it, he has been judged (all politicks apart) to be a very unfit person for a Chief Justice of the United States."[2] "I am pleased that the Senate of the United States discovered so much firmness," wrote William Plumer to Jeremiah Smith. "A man who hastily condemned in a town meeting, in such opprobrious terms, a treaty with a foreign nation, ought not to preside in the highest judicial Court of the Union. . . . The conduct of the Senate will, I hope, teach demagogues that the road to preferment in this enlightened country is not to revile and calumniate government and excite mobs in opposition to their measures." Jefferson, on the other hand, wrote to William B. Giles: "The rejection of Rutledge by the Senate is a bold thing, for they cannot pretend any objection to him but his disapprobation of the treaty. It is, of course, a declaration that they will receive none

[1] See *New York Daily Advertiser*, Dec. 19, 1795. The *Boston Gazette*, Feb. 22, 1796, published a letter from Philadelphia dated Jan. 9, 1796, stating that: "The Georgia Senators have arrived and are chagrined that the appointment of the Chief Justice had been submitted when their State was unrepresented. The thing looks disrespectful, but may have been accidental."

[2] *Columbian Centinel*, Dec. 26, 1795; *Plumer Papers MSS*, letter of Plumer to Smith, Jan. 1, 1796; *Jefferson*, VIII, Dec. 31, 1796; *Boston Gazette*, Feb. 22, 1796, quoting letter from Philadelphia of Jan. 9, 1796.

but tories hereafter into any Department of the Government." An interesting view of the situation from the Anti-Federalist standpoint appeared in a letter sent to Charleston from Philadelphia at this time: "I can easily figure to myself your astonishment at hearing the Senate had negatived the appointment of the Chief Justice. Although he is revered in Carolina by the glories of his actions, particularly those which illuminated your political hemisphere during the difficult times in which he held the reins of government, yet such is the violence of party spirit, the force of stockjobbing influence and the prejudice of our Anglomen here that it is regarded as wise in the Senate to keep out of office everyone who has spoken disrespectfully of the treaty lately made or Mr. Jay. In the majority of the Senate are gentlemen who are personally acquainted with the Chief Justice, intimately acquainted with his splendid talents and sound judgment, and who, in their conversations out of Senate, do homage to his pure patriotism and republican firmness. But the fact is, that Mr. Hamilton who manages the Senate, has become a perfect terrorist, and his satellites and votaries disseminate with uncommon industry the following principle: that it is ruinous to admit into administration any man who may refuse to go all lengths with it; that our citizens who expressed their disapprobation of the commercial treaty are enemies to the general government; that most of them are in the pay of France, and the object of their service is the overthrow of the Constitution. If your citizens preserve that political honesty they were so rich in when I knew them, this sort of doctrine will shock them. They will exclaim, what political blasphemy! What effrontery! But here, where stockjobbers, speculators and American Anglo-men have duped many of our honest, un-

suspecting and many of our timid citizens, it passes as orthodox."

The rejection of Rutledge was an event of great importance in American legal history, which has hitherto received cursory attention. But for his unfortunate Charleston speech he would undoubtedly have been confirmed, despite the rumor as to his mental condition. As his death did not occur until the year 1800, the Chief Justiceship, if held by him, would have become vacant at a time when it is extremely unlikely that President Adams would have appointed John Marshall as his successor. Thus upon the event of one chance speech regarding a British treaty hinged the future course of American constitutional law.

Upon the failure of his first nomination, Washington offered the position to Patrick Henry, but old age (and a possible feeling that he ought to have been appointed earlier) led Henry to decline. Washington then named Judge William Cushing on January 26, 1796.[1] The appointment, while an appropriate one, did not meet with enthusiastic Federalist approval. "I am disappointed in the appointment of Cushing as Chief Justice," wrote Plumer. "He is a man I love and esteem. He once possessed abilities, firmness and other qualities requisite for that office, but Time, the enemy of man, has much impaired his mental faculties. When Jay resigned, Cushing was the eldest Justice, and I fear that the promotion will form a precedent for making

[1] *Patrick Henry* (1891), by William Wirt Henry, II, 563, 564. See also letter of Washington to Lee as to Patrick Henry, Aug. 26, 1794, *Washington*, X.

It is said that the first intimation Cushing received of the new honor was at a diplomatic dinner given by the President, when Washington bowed to him and, pointing to a vacant place, said: "The Chief Justice of the United States will please take the seat on my right." *Lives of the Chief Justices* (1854), by George Van Santvoord, 277. On Jan. 27, 1796, Timothy Pickering, Secretary of State, wrote to Cushing that the President desired "to avail the public of your services as Chief Justice." *William Cushing*, by Arthur P. Rugg, *Yale Law Journ.* (1920), XXX. Cushing's nomination was confirmed by the Senate, Jan. 27, 1796.

Chief Justices from the eldest Judge though the other candidates may be much better qualified." Cushing, however, felt unable to accept, and "with an extraordinary degree of moderation" (as Iredell wrote) declined the position, February 2, without ever taking his place as head of the Court.[1] Washington was now left in something of a quandary. He would have liked to appoint Judge Iredell, for whose ability he had a great admiration, but he could hardly pass over Judge Wilson, Iredell's senior on the Bench. Public rumor pointed to the promotion of Judge Paterson; but the President solved the problem by deciding to go outside the Court and to make an appointment from among the members of the Bar, his choice falling upon the drafter of the Judiciary Act, Oliver Ellsworth, of Connecticut. Ellsworth, at the time of his appointment on March 3, 1796, was fifty-one years old; he had been a Judge of the highest Court of his State from 1784 to 1787. As a stanch Federalist, his appointment, wrote Wolcott to Jonathan Trumbull, "will be very satisfactory to all who are willing to be pleased. If our country shall be saved from anarchy and confusion, it must be by men of his character." Jeremiah Smith of New Hampshire wrote: "He is a good man and a very able one, a man with whom I am very well acquainted and greatly esteem." William Plumer wrote to Smith: "I am pleased with the character you give him, and rejoice at his appointment. The office is important. In that Court, questions of the greatest magnitude, not only as regard the National character, but the lives, liberty and property of individuals must ultimately be

[1] *Plumer Papers MSS*, letter of Plumer to Smith, Feb. 17, 1796; letter of Timothy Pickering, Feb. 2, 1796, *Mass. Hist. Soc. Proc.*, XLIV. Iredell himself wrote, Feb. 27, 1796: "I am sorry that Mr. Cushing refused the office of Chief Justice, as I don't know whether a less exceptionable character can be obtained, without passing over Mr. Wilson, which would perhaps be a measure that could not be easily reconciled to strict propriety." *Iredell*, II, 460, 462.

decided. A good Judiciary is highly useful." [1] To the Bench, the appointment was evidently not so satisfactory; and Judge Iredell wrote that he thought it would cause Judge Wilson to resign. "The kind expectations of my friends that I might be appointed Chief Justice were too flattering. Whatever other chance I might have had, there could have been no propriety in passing by Judge Wilson to come at me. The gentleman appointed, I believe, will fill the office extremely well. He is a man of excellent understanding and a man of business."

Before the Senate had acted on the Rutledge appointment, another vacancy on the Court occurred through the resignation of John Blair of Virginia in the early summer of 1795. "Why did Judge Blair resign?" wrote William Plumer to Jeremiah Smith. "From the little acquaintance I have had with him, I consider him as a man of good abilities, not indeed a Jay, but far superior to Cushing, a man of firmness, strict integrity and of great candour, qualities essentially necessary to constitute a good Judge." [2] Edmund Randolph who appears to have desired the position,[3] and to whom it was apparently offered by the President in July, 1795, had finally decided not to accept, only a few weeks before his forced resignation as Secretary of State owing to the Fauchet letter scandal. James Innes, the leader of the Virginia Bar, was strongly recommended for the Blair vacancy by John Marshall and by Washington's intimate personal friend, Edward

[1] *Life of Jeremiah Smith* (1845), by John H. Morison, letter of Smith to Samuel Smith, March 5, 1796; *Plumer Papers MSS*, letter of Plumer to Smith, March 31, 1796; *Iredell*, II, letter of March 25, 1796.

Ellsworth was confirmed by the Senate on March 4, 1796, by a vote of twenty-one to one.

[2] *William Plumer Papers MSS*, letter of Feb. 19, 1796. Charles Simms, a leading lawyer of Alexandria, Va., was an applicant for appointment in Blair's place; see letter of Dec. 25, 1795. *Calendar of Applications* (1901), by Gaillard Hunt.

[3] *Washington Papers MSS*, letter to Randolph from Washington, July 7, 1795.

Carrington. Since the President, through these two men, had already offered to Innes the position of Secretary of State and had considered him as Attorney-General, it was singular that he did not adopt their suggestion; but he wrote on December 23 to Carrington that: "It had been expected that the Senate would not confirm the appointment of Mr. Rutledge, and so it has happened. This induced me to delay the nomination of a successor to Mr. Blair, as a vacancy in the Department of War is yet unfilled. I am waiting expected information to make a general arrangement, or rather, distribution of these offices, before I decide upon either separately."[1]

Finally, Washington solved the problem by appointing Timothy Pickering of Massachusetts to the office of Secretary of State (which he had previously offered successively to Judge Paterson, Patrick Henry, James Innes of Virginia, Rufus King of New York, and Charles C. Pinckney of South Carolina); for the office of Secretary of War and Navy (which he had offered to Edward Carrington, who declined) he chose James McHenry of Maryland; for the position of Attorney-General (which he had offered to John Marshall of Virginia and for which he had considered Samuel Dexter and Christopher Gore of Massachusetts) he chose Charles Lee of Virginia; the Chief Justiceship went to Oliver Ellsworth of Connecticut; and for the vacancy among the Associate Judges, he chose Samuel Chase of Maryland, who was then fifty-five years of age and who had been strongly recommended for appointment, by McHenry, six months before.[2] McHenry now said

[1] *Washington Papers MSS*, letter of Washington to Carrington, Dec. 23, 1795. See letters of Washington to Carrington, Sept. 28, 1795, Carrington to Washington, Oct. 28, 30, Nov. 13, 1795, as to Innes.

[2] *Washington Papers MSS*, letter of McHenry, June 12, 1795; *Life and Correspondence of James McHenry* (1907), by Bernard C. Steiner.

Chase was nominated on Jan. 26, 1796, and confirmed by the Senate on Jan. 27, at the same time with Cushing as Chief Justice.

that Chase would accept and that "he requested me to tell you 'that he receives your intention to nominate him to a seat on the Supreme Judicial Bench of the United States with the utmost gratitude.' He added 'The President shall never have reason to regret the nomination', and I believe it. He agrees to be in Philadelphia by the first Monday in next month. Thus, Sir, you see what you have done. You have made an old veteran very proud and happy, and one not very young to approach the station you have assigned him with fear and trembling; for who hereafter may hope to escape without a wound, whilst there are men to be found who could aim poisoned arrows at yourself?" A week later, McHenry wrote that Chase "is extremely pleased with his appointment, and I have strong hopes that its good effects as it respects the public will extend beyond the judicial department. . . . I pray you to receive him kindly and cordially." [1] In view of the subsequent career of Chase on the Bench and the fact that by his arbitrary actions he became the storm center for the Anti-Federalist attack on the Federal Judiciary, it must be admitted that McHenry's hopes and predilections were unjustified, and that Chase's confidence that "the President shall never have reason to regret the nomination" was disproved by events. There were Federalists in Washington's own circle who gravely doubted the wisdom of the nomination. "I have but an unworthy opinion of him (Chase)," wrote Oliver Wolcott; William Plumer wrote that the appointments of Cushing and Chase "do not encrease the respectability and dignity of the Judiciary"; and Iredell wrote that: "I have no personal acquaintance with Mr. Chase, but am not impressed with a very favorable opinion of his moral character, whatever his

[1] *Washington Papers MSS*, letters of McHenry, Jan. 24, 31, 1796.

professional abilities may be." From the above expressions of opinion, it is apparent that the new Judges, Chase and Ellsworth, must have come into a Court none too enthusiastic to accept them.

At the February Term of 1796, six cases were heard, two of which were of the highest importance. In *Ware, Adm'r.* v. *Hylton*, 3 Dallas, 199, there was presented the great question of vital interest to the relation of the States to the Federal Government, whether State laws confiscating and sequestrating debts due to a British enemy or allowing their payment in depreciated currency were valid against the provisions of the treaty with Great Britain. Its decision involved the pecuniary fortunes of the States as well as of hundreds of American citizens; in Virginia alone it was estimated there were more than $2,000,000 of such British debts. Political excitement over the case was intense; and in view of the divisions of the country on pro-British and pro-French factions a decision in favor of the British creditors was likely to strengthen the Anti-Federalist party and the opponents of the Administration. As Edmund Randolph wrote to Washington: "The late debates concerning British debts have served to kindle a wide-spreading flame. The debtors are associated with the Anti-Federalists, and they range themselves under the standard of Mr. Henry, whose ascendancy has risen to an immeasurable height." [1] The question had been originally argued in Virginia before Judges Johnson and Blair, and District Judge Griffin, in September, 1791, and again in May, 1793, before Chief

[1] See *Patrick Henry* (1891), by William Wirt Henry, II, 472, 476, 636. The *Connecticut Journal* said, Sept. 29, 1794: "The high-flying Democrats are continually 'letting the cat out of the bag.' As late as the last month, the Grand Jury of the Federal Circuit Court in Virginia presented as a *national* grievance the recovery of debts due to British subjects, contracted prior to the year 1774. Spendall in the play says, 'It is a cursed thing to pay debts — it has ruined many a man.' " See also *Wirt*, II, letter to Gilmer, Nov. 2, 1828.

Justice Jay and Judges Iredell and Griffin.[1] Amongst the counsel appearing for the British creditors had been the then leader of the Virginia Bar, John Wickham, and for the State and the debtors, the aged Patrick Henry. In the Supreme Court, Edward Tilghman, Alexander Willcocks, and William Lewis of Philadelphia appeared for the creditors against John Marshall and Alexander Campbell; and it is interesting to note that Marshall, in arguing against the binding force of the treaty over the State legislation, referred to "those who wish to impair the sovereignty of Virginia", thus employing the very phrase which the ardent State-Rights adherents used so frequently in after years in attacking his own decisions as Chief Justice. Of Marshall's argument (his only one in the Court) William Wirt, who was present, wrote: "Marshall spoke as he always does, to the judgment merely, and for the simple purpose of convincing. Marshall was justly pronounced one of the greatest men of the country. He was followed by crowds, looked upon and courted

[1] In the *General Advertiser*, June 15, 1793, a letter from Richmond, dated June 7, said: "The Federal Judges have this day delivered their opinions upon the great question of British debts which was unanimous for the payment. Griffin and Iredell were for substituting the payments of paper money into the Treasury; Jay was of a contrary opinion, and the latter gave one of the most able opinions I ever heard delivered — and to disinterested persons the most satisfactory and conclusive." In the *National Gazette*, July 3, 1793, a letter from Richmond said that the town "is full of patriots, and no enemy to the French Revolution among them dares to open his mouth to vent his pestiferous principles. Judges Jay and Iredell have finished the discussion on the payment of the old British debts in favour of the British." In *An Address to the People of the United States with an Epitome and Vindication of the Public Life and Character of Thomas Jefferson* (Worcester, Mass., 1802), an account is given of trials in the Federal Court of a case brought by British creditors against Thomas Jefferson as executor of the estate of a Mr. Wayles, and in which General John Marshall and Bushrod Washington appeared for the executors. In this account, it is stated that Jefferson's right to the payment of the debt into the Virginia State Treasury under the Virginia statute "was so well founded that it received the sanction of a Circuit Court; and although that decision was afterwards reversed by the Supreme Court, everybody who attended on the Court will recollect that impressive argument of Mr. Marshall . . . in support of the decision of the Circuit Court and it will remain a doubt whether it ought not to have been affirmed."

with every evidence of admiration and respect for the great powers of his mind. Campbell was neglected and slighted and came home in disgust. Marshall's maxim seems always to have been 'Aim exclusively at strength.' " Of his reception and first acquaintance in Philadelphia, on this initial appearance before the Court, Marshall himself wrote: "I then became acquainted with Mr. (George) Cabot, Mr. (Fisher) Ames, Mr. (Samuel) Dexter, Mr. Sedgwick of Massachusetts, Mr. (Jeremiah) Wadsworth of Connecticut, Mr. (Rufus) King of New York. I was delighted with these gentlemen. The particular subject (the British Treaty) which introduced me to their notice, was at that time so interesting, and a Virginian who supported with any sort of reputation the measures of the government was such a *rara avis*, that I was received by them all with a degree of kindness which I had not anticipated." [1] While the Court was gravely impressed with "the uncommon magnitude of the subject, its novelty, the high expectation it has excited and the consequences with which a decision may be attended" (in the words of Judge Iredell), it found little difficulty in reaching a conclusion; and within two weeks after the argument, four Judges then sitting (Paterson, Cushing, Wilson and Chase) concurred in declaring that the British treaty provisions must prevail over any State laws, that the British creditors were entitled to recover, and in general that a treaty so far as it is compatible with the Constitution supersedes all State laws which derogate from its provisions. Thus was settled forever one of the fundamental doctrines of American law. On the day after the decision of this momentous case, the Court rendered its opinion in a case of even greater import in the history of the law, *Hylton* v. *United States*,

[1] See *Oration of William Henry Rawle*, May 10, 1884, 112 U. S. App. 753.

3 Dallas, 171, in which for the first time it exercised its function of passing upon the constitutionality of an Act of Congress. It is a most singular circumstance that a case of such consequence, involving the question whether a Federal tax on carriages was a direct tax within the meaning of the Constitution, should have been presented on an agreed statement the facts in which were fictitious, should have been actually a moot case since the counsel on both sides were paid by the Government, and should have been decided by only three of the six Judges; yet all these features were present in the case. The defendant Hylton formally stated that "my object in contesting the law upon which the cause depends" is "merely to ascertain a constitutional point and not by any means to delay the payment of a public duty." [1] The Government in its agreed facts made the fictitious allegation that the defendant kept one hundred and twenty-five chariots "exclusively for the defendants' own private use and not to let out to hire." And the Government entered into a formal stipulation to pay the counsel fees on both sides for the argument in the Court, since, as Attorney-General Bradford wrote to Hamilton, the appellant's counsel had advised him "to make no further argument and to let the Supreme Court do as they please, and that in consequence of this advice no counsel will appear in support of the writ of error. Having succeeded in dividing the opinion of the Circuit Court, he wishes to prevent the effect which a decision of the Supreme

[1] This formal statement by Hylton does not appear in *Dallas Reports* but is on the files of the Court. *7th Cong., 1st Sess.* The fictitious allegation in the agreed facts was undoubtedly to give jurisdiction to the Circuit Court in the sum of $2000, the tax and penalty for one chariot being only $16, and the agreed facts reciting that: "If the Court adjudged the defendant to be liable to pay the tax and fine for not doing so and for not entering the carriages, then judgment shall be entered for the plaintiff for $2000 to be discharged by the payment of sixteen dollars, the amount of the duty and penalty."

Court on *full argument* would have, and perhaps by the circulation of his pamphlet in the meantime to indispose the people of Virginia to paying the next annual duty on their carriages." [1] The argument was made by Charles Lee, Bradford's successor as Attorney-General, and by Hamilton as special counsel for the Government, and by Alexander Campbell of Virginia and Jared Ingersoll of Pennsylvania for Hylton. Hamilton's appearance before the Court for the first time (his retirement from the post of Secretary of the Treasury having only recently taken place) was the object of much public interest. "Mr. Hamilton spoke in our Court, attended by the most crowded audience I ever saw there, both Houses of Congress being almost deserted on the occasion," wrote Judge Iredell. "Though he was in ill health, he spoke with astonishing ability, and in a most pleasing manner, and was listened to with the profoundest attention." A contemporary newspaper account stated that "the whole of his argument was clear, impressive and classical. The audience, which was very numerous and among whom were many foreigners of distinction and many of the Members of Congress, testified the effect produced by the talents of this great orator and statesman." On the other hand, Madison in writing to Jefferson made a slighting comment upon Hamilton's argument: "The Court has not given judgment yet on the carriage tax. It is said the Judges will be unanimous for its constitution-

[1] *The Intimate Life of Alexander Hamilton* (1911), by Allan McLane Hamilton, letter of Bradford to Hamilton, Aug. 4, 1795; see *Hamilton Papers MSS* for the letter in full, and for letter of Wolcott to Hamilton, Jan. 15, 1796, requesting his attendance at the coming argument of the case. See also *Amer. State Papers, Misc.*, I, 393, in which in a report of the Secretary of the Treasury to Congress, March 24, 1804, it is said as to this case: "In order to obtain a final decision on that question, a case was agreed with the defendant in the Circuit Court, on which an appeal was made to the Supreme Court. The condition of that agreement was that the United States should pay all the expenses incident to the appeal." Campbell and Ingersoll were paid $233.33 each and Hamilton $500.

ality. Hamilton and Lee advocated it at the Bar against Campbell and Ingersoll. Bystanders speak highly of Campbell's argument, as well as of Ingersoll's. Lee did not shine, and the great effort of his coadjutor, as I learn, was to raise a fog around the subject, and to inculcate a respect for the Court for preceding sanctions in a doubtful case." [1] Eleven days after the argument, the Court, on March 8, 1796, rendered its decision interpreting the meaning of the words "direct tax" as used in the Constitution and upholding the validity of the Act of Congress imposing the carriage tax. Since the new Chief Justice, Oliver Ellsworth, had just been sworn into office that day, he took no part in the decision; and therefore this great constitutional case was decided by three of the six Judges — Iredell, Paterson and the new Judge, Samuel Chase (who had taken his seat for the first time, February 4); Judge Wilson, having sat in the Court below, gave no opinion; and Judge Cushing had been ill at the argument.

The August Term of 1796 presented to the new Chief Justice a large number of prize and admiralty cases with which he was particularly well fitted to deal, since, twenty years before, he had been a member of the Committee of Appeals of the Continental Congress which was the appellate tribunal in such matters.[2] In the very first case which came before Ellsworth, *United States* v. *La Vengeance*, 3 Dallas, 297, the Court

[1] *Iredell*, II, 461, letter of Feb. 26, 1796; *Madison* (1865), II, letter of March 6, 1796. The *Columbian Centinel* (Boston) said, March 9, 1796, that Mr. Hamilton "by his eloquence, candour and law knowledge has drawn applause from many who had been in the habit of reviling him."

Judge Story later said: "I have heard Samuel Dexter, John Marshall, and Chancellor Livingston say that Hamilton's reach of thought was so far beyond theirs that by his side they were schoolboys — rush tapers before the sun at noon day." *Life of Rutherford Birchard Hayes* (1914), by Charles R. Williams, I, diary, June 12, 1844.

[2] Ellsworth's first Federal judicial service was in the Circuit Court in Georgia, his charge to the Grand Jury in which, April 25, 1796, appears in *Lives and Times of the Chief Justices* (1858), by Henry Flanders, II, 189.

rendered a notable opinion which, in subsequent years, served as the basis for the broad extension of Federal admiralty jurisdiction to inland navigable rivers, to the Great Lakes, and elsewhere off the high seas. The case involved a libel of a vessel for unlawfully exporting arms from Sandy Hook in New Jersey to French dominions. It was contended by Charles Lee in his argument against Peter S. Duponceau, that the English common law should prevail and that an act committed not wholly on the high seas but partly within the confines of a State should be held not to be within admiralty jurisdiction. The Court decided to the contrary; and though the decision was a bold one in its assertion of Federal authority and has been frequently attacked, it has been steadily adhered to as one of the fundamental decisions of American law.[1] In another admiralty case, the fairness with which, in spite of the political prejudices rife at that time, the Court was determined to treat foreign powers was illustrated in *Moodie* v. *Ship Phœbe Anne*, 3 Dallas, 319. A French privateer, driven by storm into a United States port and having made repairs there, was libeled for breach of our neutrality; and counsel argued "the impolicy and inconveniency of suffering privateers to equip in our ports." Ellsworth, however, in deciding in favor of France said that: "Suggestions of policy and conveniency cannot be considered in the judicial determination of a question of right; the treaty with France,

[1] *Kent Com.*, I, 376. Judge Woodbury, dissenting in *Waring* v. *Clark*, 5 How. 441, said the decision was "the parent of mistaken references." Kent said that the case was not "sufficiently considered." Charles Lee, arguing in 1808 in *U. S.* v. *Schooner Betsy*, 4 Cranch, 446, note, said: "I argued the case of the *Vengeance* and I know it was not so fully argued as it might have been; and some of the Judges may recollect that it was rather a sudden decision," to which Judge Chase tartly replied: "I recollect that the argument was no great thing, but the Court took time and considered the case well." See also *Amer. State Papers, For. Rel.*, I, 588, 628, letters of Adet to Pickering, Nov. 15, 1796, Harrison to Pickering, Dec. 12, 1796.

whatever that is, must have its effect. By the 19th Article, it is declared that French vessels . . . may, on any urgent necessity, enter our ports, and be supplied with all things needful for repairs. In the present case, the privateer only underwent a repair; and the mere replacement of her force cannot be a material augmentation; even if an augmentation of force could be deemed (which we do not decide) a sufficient cause for restitution."[1] One further noted case was on the docket for argument at this Term; but, fortunately for the stability of the young Government, it was continued. This was the case of *Hunter* v. *Fairfax's Devisee*, 3 Dallas, 305, which involved the bitterly fought questions of the right of an alien to take land in Virginia by devise and the right of Virginia to confiscate alien-enemy land. Its decision, twenty years later, produced a direct conflict between the State and the United States Judiciary, and had it been decided in 1796, when the Federal Government was weakened by bitter factional dissension, a similar conflict might have had serious results. The immediate subject of the suit was 788 acres of land, which had been confiscated by Virginia and granted to David Hunter, but its decision would affect the title to about 300,000 acres previously owned by the late Lord Fairfax. The lower Court having decided against Hunter, an appeal had been taken to the United States Supreme Court, and Hunter wrote to Alexander Hamilton, July 7, 1796, asking him to appear as counsel and offering him a fee of $400, to

[1] The case of *Jones* v. *LeTombe*, 3 Dallas, 384, may be noted as one of the few actions ever brought originally in the Supreme Court, under the clause of the Constitution giving to that Court original jurisdiction in cases involving "ambassadors, other public ministers, and consuls." It was a "capias in case" against the French Consul-General. A rule was issued to the plaintiff to show his cause of action; and the plaintiff producing his paper and affidavit, it appeared that the suit was against the French Government and the rule was made absolute. See opinion of Attorney-General Lee, Nov. 21, 1797, *Ops. Attys.-Gen.*, I, 77.

be made up to $1000 if successful, or in substitution the "fee of the land worth about $2000." [1] In his letter, he stated that the Governor of Virginia had directed the appeal to be entered and to be prosecuted at the expense of the State but that the Legislature had declined to authorize the expense, consequently he was forced to prosecute it himself. "Mr. (John) Marshall of this State and the Attorney General of the United States, Mr. (Charles) Lee will argue the cause on behalf of Fairfax. Several reasons induce me to wish a postponement of this trial until the February Term. If this can be obtained, it is probable that the Legislature of this State and perhaps some others will see the propriety of defending themselves against the claims of the late proprietors and their representatives. I believe there can be no doubt but that several of the States who were subject to proprietary grants will find themselves in as great danger from their clamor as this State is from the claim of Denny Fairfax for the Northern Neck. At least 150,000 pounds has been paid into the Treasury for vacant lands in the Northern Neck." [2] Hamilton declined to take the case, writing: "It not being my general plan to practice in the Supreme Court of the United States"; and on July 19, Hunter's counsel in Virginia, Alexander Campbell, died. Accordingly, Hunter addressed a letter to the Court, asking for postponement. After argument in opposition by Lee and Jared Ingersoll, the Court continued the case, stating that

[1] *Hamilton Papers MSS*, letter of July 7, 1796; this letter has never been published.

[2] See also *Marshall*, II, 206–207; *History of the Supreme Court of the United States* (1912), by Gustavus Myers, 237–240. Among other States similarly affected was North Carolina, where later the case of *Granville* v. *Davies* in the Federal Circuit Court in 1805 involved somewhat the same issues. *The Granville Estate and North Carolina*, by Henry G. Connor, *U. of P. Law Rev.* (1914), LXII; see also *Jefferson Papers MSS*, letter to Eldridge Rolfe, March 4, 1803; *James Sprunt Hist. Monograph No. 3*, letters of John Steele to Nathaniel Macon, April, 1803, and Macon to Steele, June 11, 1803; *American Daily Advertiser*, April 7, 1809.

it was a cause of such magnitude that counsel should have an opportunity to investigate the principles and consider the authorities. "It is a matter of great moment," said Judge Chase, "and ought to be deliberately and finally settled." In this way, a subject productive of excited controversy disappeared from the Court's docket for nearly twenty years.

At the February and August Terms in 1797, eight cases were decided, none of which were of great importance. The Terms in 1798 were equally barren.

On August 21, 1798, Judge Wilson, whose health had been bad for the past two years, and who had been overwhelmed by serious financial troubles, died at the early age of fifty-six. He had been a profound lawyer and a great Judge, and as Judge Iredell wrote in 1794, his "affability and politeness gave great satisfaction to both the Bar and the people." His end amidst such misfortune was, therefore, peculiarly sad. To succeed Wilson, five men were mentioned — Jacob Rush,[1] Samuel Sitgreaves, and Richard Peters (United States District Judge) of Pennsylvania, and Bushrod Washington and John Marshall of Virginia. Rush withdrew his name; Sitgreaves was too inexperienced; Peters would not accept the appointment even if offered, owing to the inadequacy of the salary and the onerous Circuit Court duties imposed upon Supreme Court Judges. Marshall, while not as eminent at the Bar as several other lawyers of Virginia, had just returned from his mission with Pinckney and Gerry in France, and was now highly popular with the American people as a result of the revelation of the mysterious X. Y. Z. correspondence. Washington, who had studied law

[1] Rush was born in 1747, a graduate of Princeton in 1765 and of the Middle Temple in London in 1771, a Judge of The Supreme Court of Pennsylvania in 1784, President of the Third Circuit in 1791. See *Jacob Rush and the Early Pennsylvania State Judiciary*, by Louis Richards, *Penn. Bar Ass.* (1914), XX.

in Judge Wilson's office, though only thirty-six years of age, had already acquired a reputation as a profound lawyer and was recommended for the position by Attorney-General Lee. As Virginia had had no representative on the Court since Blair's resignation in 1795, President Adams determined that the appointment should go to that State, but he apparently thought that there was very little choice between the two candidates; for he wrote to Secretary of State Pickering: "The reasons urged by Judge Iredell for an early appointment of a successor [to Wilson] are important. I am ready to appoint either General Marshall or Bushrod Washington. The former I suppose ought to have the preference. If you think so, send him a commission. If you think any other person more proper, please to mention him." [1] Pickering, in his reply giving his view of the possible candidates, wrote somewhat whimsically of "B. Washington, a name that I have never heard mentioned but with respect for his talents, virtues and genuine patriotism. But he is young, not more, I believe, than three or four and thirty. His indefatigable pursuit of knowledge and the business of his profession has deprived him of the sight of one eye; it will be happy if the loss does not make him perfectly the emblem of justice." To this Adams answered, September 26, that: "The name, the connections, the character, the merit and abilities of Mr. Washington

[1] *Pickering Papers MSS*, 347, letters of Pickering to Dr. Benjamin Rush, Sept. 19, 1798, to John Adams, Sept. 20, 1798, letter of Adams to Pickering, Sept. 13, 1798, in Library of Congress; *Works of John Adams*, VIII, 597.

Pickering wrote to George Cabot, Nov. 10, 1798: "The President's unbiased opinion of Gen. Marshall, I cannot withhold from you. It is given in a letter of Sept. 26 (as follows): . . . The only candidates about whom there appeared any competition in the President's mind were Bushrod Washington and John Marshall. I gave to the President reasons why Marshall would decline the office. The President in his answer said he could not blame him if he should decline. Washington was the alternative. . . . I hope Marshall can get into politics. . . . He will assuredly act with the intelligent New England men." *Life and Letters of George Cabot* (1877), by Henry Cabot Lodge.

are greatly respected, but I still think that General Marshall ought to be preferred. Of the three envoys, the conduct of Marshall alone has been entirely satisfactory and ought to be marked by the most decided approbation of the public. He has raised the American people in their own esteem. And if the influence of Truth and Justice, Reason and Argument is not lost in Europe, he has raised the consideration of the United States in that quarter of the world. . . . He is older at the Bar than Mr. Washington, and I know by experience that seniority at the Bar is nearly as much regarded as in the army." Accordingly, the appointment was tendered to Marshall but was declined by him, and Pickering in forwarding the letter of refusal to the President wrote: "I transmit the letter, as well that his own grateful sense of the offer might be seen, as for the strong expression of the opinion of so good a judge on the fitness of conferring the office on Mr. Washington whose talents and character are so perfectly well known to him." Thereupon, President Adams directed that the vacancy be filled by the appointment of Bushrod Washington, and the commission was sent to him, October 6, 1798 (a recommission being made on December 20, after the Senate convened).[1]

At each of the two Terms in 1799 but four cases were decided, no one of which was of marked interest, though *New York* v. *Connecticut*, 4 Dallas, 1, may be noted as the first instance of a suit by one State against another.[2]

[1] *Pickering Papers MSS*, XXXVII, 338, letter of Timothy Pickering to John Adams, Oct. 5, 1798, letter of Pickering to B. Washington, Oct. 6, 1798, stating that "the President of the United States being desirous of availing the public of your services as one of the Associate Justices."

[2] See *Connecticut-New York Boundary Line*, by Simeon E. Baldwin, *New Haven Colony Hist. Soc. Proc.* (1882), III. See resolution introduced into Congress by Livingston of New York, Feb. 15, 1798, "that provision ought to be made by law allowing the trial of all cases, in which one or more States may be interested in such suit or suits. *5th Cong., 1st Sess.*, 1035, 1267. The method of beginning suit against a State had been established as early as 1796 in *Grayson* v. *Virginia*, 3

Judge Iredell died on October 2, and President Adams appointed in his place, on December 6, 1799, Alfred Moore of North Carolina. Moore was forty-four years old, had been Attorney-General of the State for five years, and was a Judge of its Supreme Court.

At its February Term in 1800, the Court decided seven cases of slight historical importance.

The last Term in which the Court sat in the city of Philadelphia was held in August, 1800, and under great difficulties; for on August 4, when the session should have begun, only Judges Paterson, Moore and Washington were present; Chief Justice Ellsworth, who had been appointed Envoy to France by President Adams, February 25, 1799, was in Europe; Judge Cushing was ill; and Judge Chase was in Maryland, engaged in electioneering for Adams in the pending Presidential campaign.[1] That the Court could no longer rely on freedom from political criticism now became manifest, when two cases were presented to it involving decisions on questions which had become political issues. In *Bas* v. *Tingy*, 4 Dallas, 37, the Court was confronted with serious questions arising out of the French spoliations on American commerce and the American retaliatory legislation of the past two years. The Federalists had insisted that a state of actual war with France existed,

Dallas, 320; that service of process should be made on the Governor and Attorney-General; that subpoenas when issued should be served sixty days before return day; and that on a failure of a State to appear, the complainant might proceed *ex parte*. Eighteen years later, in December, 1818, a bill was introduced in Congress prescribing the mode of commencing, prosecuting, and deciding controversies between two or more States; "but after debate, it was indefinitely postponed." *15th Cong., 2d Sess.*, 74, 120.

[1] Judge Chase's absence drew upon him a savage attack from the Anti-Federalist newspapers — an attack which, on the standards of today, would appear to be partially justified — for he was speaking at political gatherings in Maryland in behalf of Adams' candidacy for the Presidency. See the *Aurora*, Aug. 4, 8, 9, 11, 1800, which referred to "the Supreme Court adjourning from day to day and the business of the Nation being held up until Chase shall have disgorged himself. O Tempora, O Mores! . . . The suspension of the business of the highest Court of Judicature in the United States to allow a Chief Justice to add nine thousand

and that all measures taken against the French were thus to be justified. The Anti-Federalists, French partisans, had stoutly denied this. An intense state of feeling existed on both sides. The Court was now called on to decide whether France was an "enemy" within the meaning of the statute of 1799, providing for salvage for ships "retaken from the enemy within twenty-four hours." The Court held that a state of "limited, partial war" existed, thus sustaining the contention of the Federalist party, who hailed the decision with applause. The Anti-Federalists on the other hand did not hesitate to express their hostility to the Court's pronouncement; and for the first time in the history of the Government, there was uttered a suggestion that a Judge should be impeached for rendering a judicial decision, when the *Aurora* stated that the decision was "most important and momentous to the country, and in our opinion every Judge who asserted we were in a state of war, contrary to the rights of Congress to declare it, *ought to be impeached.*" [1] In the other important case of this Term, *Talbot* v. *Ship Amelia*, 4 Dallas, 34, the Court was confronted with the necessity of deciding a question of the most delicate and explosive nature at that period, namely, whether an American citizen possessed an inherent or legal right to expatriate himself and to become a citizen of France.[2] A decision by Chief Justice Ellsworth sitting in the Circuit Court, the previous year, holding adversely to such right and basing his decision on English common law had aroused intense antagonism. It was with relief, therefore, that the Court now took advantage of the

dollars to his salary and to permit Chase to make electioneering harangues in favor of Mr. Adams is a mere bagatelle!"

[1] *Aurora*, Aug. 22, 23, 25, 1800.

[2] "A cause of very great importance both on account of the legal principles applicable to neutral commerce and the magnitude of the pecuniary interest involved in the event, being no less than $180,000." *American Daily Advertiser*, Aug. 18, 1800

absence of the Chief Justice and of Judge Cushing, and (as stated in the newspapers), "this being a cause of the first impression, ordered it to be continued for the purpose of hearing a further argument before a fuller Court." [1]

With the close of this Term, the last to be held in Philadelphia, there came to an end a distinct period in the Court's history.[2] For eleven years it had existed, formulating with comparatively little criticism the general principles of judicial procedure and of international and constitutional law on which its subsequent career was to be based. Thus far, it had been singularly free from hostile attack; but a great change in the attitude of the public towards the Court was now impending. The increasing rancors due to the existence of the British and French factions in this country and to the somewhat immoderate legislation of President Adams' Administration had aroused a furious spirit of partisanship. Into this boiling political caldron, the Court had been drawn during the past two years, by reason of the fact that all the delicate questions on which the Federalist and the Anti-Federalist parties were

[1] The final sitting of the Court at Philadelphia was thus described in the *Aurora*, Aug. 19, 1800: "On Friday last, the Supreme Court of the United States arose after a session of one week, during which time they heard and determined sundry causes of great importance. The case of *Talbot* v. *Seaman* is continued to the next Term. . . . At the close of the term, Samuel Bayard, Esq., Clerk of the Court, resigned his office and declined to attend the future sessions which are to be held in Washington. Elias B. Caldwell, Esq., of New Jersey, has been appointed Clerk of the Court. He will reside and keep his office in Georgetown, State of Maryland."

[2] In the sixteen active Terms between 1790 and 1800, the decisions in only about sixty cases are reported by Alexander J. Dallas in his Reports, but there were various other cases decided but not reported, among which were *Pintado* v. *Berned*, see Note to 3 Dallas, 324, Aug., 1796; *Ex Parte Chandler*, *7th Cong.*, *1st Sess.*, 904; *Yale* v. *Todd*, 13 How. 52, note; *Pegan* v. *Hooper*, see *26th Cong.*, *2d Sess.*, House Doc. No. 123, opinion Atty.-Gen. Randolph, April 12, 1793; *Pepoon* v. *Jenkins*, *ibid.*, letter of E. Tilghman to Randolph, March 19, 1793; *Anonymous Case* referred to in I *Ops. Attys.-Gen.*, 71, as decided at Aug. Term, 1796; *Prize Cases* referred to in letter of Adet to Pickering, Nov. 15, 1796, *Amer. State Papers, For. Rel.*, I, 579; *United States* v. *Hopkins*, at Feb. Term, 1794, referred to in Charles Lee's argument in *Marbury* v. *Madison*.

so sharply divided—neutrality, Federal common law criminal jurisdiction, the right of expatriation, the constitutionality of the Alien and Sedition laws — had been presented in cases arising before the Judges of the Court sitting on Circuit, and on each of these questions the decisions had been invariably adverse to the view held by the Anti-Federalists. The assertion of the jurisdiction of the United States Courts in cases involving criminal indictments based on English common law and on international law, in the absence of any Federal penal statute, had been especially obnoxious to the Anti-Federalists; and the successive cases had been regarded with growing alarm — principally because such common law indictments had been chiefly employed in convictions of persons accused of pro-French activities.[1] In the fall of 1799, the feeling of hostility towards these Federal decisions had been brought to a head by a ruling made by Chief Justice Ellsworth in the Circuit Court for the District of Connecticut in the case of *United States* v. *Isaac Williams;* for, in sustaining an indictment for violation of the neutrality law prohibiting American citizens from accepting commissions to serve a foreign power, he held that an American had no right of expatriation, since under the English common law no such right existed and the common law was binding upon the United States

[1] Chief Justices Jay and Ellsworth, and Judges Cushing, Iredell, Wilson and Washington had all sustained indictments at common law in the United States Courts; and Judge Chase alone had taken the contrary view in April, 1798, in *United States* v. *Worrall,* 2 Dallas, 384. See, in general, *Politics for American Farmers* (1807), by William Duane; *Aurora,* Nov. 7, 1799; *Independent Chronicle,* Nov. 18, 1799; *History of the American Bar* (1911), by Charles Warren; *Marshall,* III, 3–45. Attorney-General Lincoln in an official opinion, May 12, 1802, said: "I doubt the competency of the Federal Courts, there being no statute recognizing the offence", *26th Cong., 2d Sess.,* House Doc. No. 123, this opinion not being published in the official *Ops. Attys.-Gen.,* I; see also letter of Jefferson, Aug. 16, 1793, as to the decisions of Jay and Wilson, relative to common law. *Amer. State Papers, For. Rel.,* I, 167.

Courts.[1] The doctrine so upheld at once elicited a flood of political abuse from the partisans of the French cause; for since the passage of the neutrality laws, American citizens who sympathized with France had made a practice of evading these laws by swearing allegiance to that country and taking French commissions to privateer against English and neutral commerce.[2] "This opinion," a writer in the *Aurora* said, "bends our necks under a foreign yoke. . . . We are not free, we are not an independent nation. . . . It is an erroneous and dangerous doctrine, unwarrantable, iniquitous and illegal. . . . The United States have no common law." A writer in the *Virginia Argus* addressed a letter to Ellsworth in which he said that: "The rights of man have been arraigned, the dignity of the American people insulted, and their Constitution profaned by your decision . . . as unprecedented in its nature as momentous in its consequences." He characterized the doctrine asserted, as a "revival of the anti-

[1] Reported in full in *Connecticut Courant*, Sept. 30, 1799, and in many contemporary newspapers throughout the United States; see also 2 Cranch, 82, note; *Wharton's State Trials*, 652; *Hall's American Law Journal*, IV, 461. In *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States* (1821), by Peter S. Duponceau, 83, it is said: "This was, in respect of its application, a most unfortunate decision, and may be compared in its effects to the Sedition law. It wounded the feelings and opinions of the American people, by denying the right of expatriation and setting up the claim of perpetual allegiance. Thus a sound doctrine by being mixed with a doubtful, and, at any rate, an unpopular principle, made the nation afraid of the common law, which they thought turned their country into a prison and preventing them from migrating whithersoever they pleased."

[2] That the Court, however, was inclined to enforce the law against Great Britain as well as against France, and to restrain unneutral acts committed on our territory by either belligerent, may be seen from a case which has not hitherto been noted by legal historians. In 1799, the Spanish Consul at Charleston, So. Car., Don Diego Morphy, brought a suit in equity to restrain the British Consul, Benjamin Moody, from selling in the United States a Spanish ship, *Nuestra Signora*, brought here as a prize by a British warship. Chief Justice Ellsworth, sitting in the Federal Circuit Court ordered an injunction, saying: "The selling of prizes is often very ensnaring, and insensibly draws in the citizens of a neutral State to depart from the observance of a strict neutrality, which is a reason why the neutral nation should be consulted. . . . An attempt therefore to exercise it is incompatible with the sovereignty of the State", and he held that such sale could not take place unless authorized by the President. *Independent Chronicle*, June 6, 1799.

quated, opprobrious system of feudal vassalage", and termed the Chief Justice "a foe to republican principles and an advocate for monarchical principles . . . a satellite of ambitious administration. . . . From the moment of your exaltation, we have seen the fundamental principles of our government, the operation of its checks and balances disregarded and Judiciary independence exchanged for a timid servility . . . in an ebullition of gratitude for your late appointment." And he concluded by saying that: "Every real American will execrate your name and all recording Truth shall enroll your vices in the annals of futurity . . . amid the applause of pollution from a degraded party composed of the refuse of British slaves and Tories." [1] Another Virginia paper said: "The natural right formerly secured to the citizens of this State by law to expatriate themselves is abrogated; by what? Not by the Constitution of the United States, not by laws made under it, but by the judgment of a Federal Court. An obsolete principle, applicable only to the personal right of the former feudal sovereigns of England, is enforced by a free republic founded on a total denial of all such rights. . . . This odious principle is now revived here after its abolition throughout modern Europe by the practice of near two centuries. . . . By the Chief Justice's opinion, we are still the subjects of Great Britain; we are so by this principle, her common law." [2] No decision by any Federal Judge had ever aroused so great and widespread resentment. Not only did the Anti-Federalists fear on general principles the spread of this doctrine of the English common law; but they pointed

[1] *Aurora*, Oct. 30, 1799. See also pamphlet entitled *Correspondence between George Nicholson, Esq., and Robert G. Harper* (1799); *Virginia Argus*, Oct. 22, 1799.

[2] See *Genius of Liberty* (Fredericksburg, Va.), quoted in *The Bee* (New London, Conn.), Oct. 30, 1799.

out the disastrous effect of the decision upon the position which the United States had taken towards the claim of England of the right to impress naturalized American seamen — a claim founded on this very common law as to expatriation. "What can we hereafter urge," said the Anti-Federalist newspapers, "when the Chief Justice sanctions with American authority the depredations on American property?"

A charge to the Grand Jury of the Circuit Court in South Carolina delivered by Chief Justice Ellsworth, in this same year, 1799, set forth even more emphatically his views of the extent of the existence of common law jurisdiction. After stating that all offenses defined in the Federal penal statutes, and all not contravening the law of nations, were indictable, he informed the jury that they might also indict for "acts manifestly subversive of the National Government, or of some of the powers specified in the Constitution. . . . An offence consists in transgressing the sovereign will, whether that will be expressed, or obviously implied. Conduct, therefore, clearly destructive of a government or its powers, which the people have ordained to exist, must be criminal." And he pointed out that indictable conduct of this nature need not be specifically defined by statute, but that "by the rules of a known law, matured by the reason of ages and which Americans have ever been tenacious of as a birthright, you will decide what acts are misdemeanours, on the ground of their opposing the existence of the National government or the efficient exercise of its legitimate powers." [1] Such a doctrine, authorizing a jury to find as criminal any act which in their opinion was "subversive of the

[1] See the charge quoted in full in *Independent Chronicle*, June 13, 1799; *Farmer's Weekly Museum*, June 17, 1799; *Virginia Argus*, Aug. 9, 1799; *Federal Gazette and Baltimore Daily Advertiser*, June 6, 1799.

National Government" or of the exercise of its constitutional powers, would at least render it possible for the party in power to use the Courts as an engine of political persecution; and it was deeply abhorrent to the views of those who believed that the powers of the Government were restricted to the express grants of the Constitution. It was with considerable reason, therefore, that widespread apprehensions were expressed at this doctrine. "It has long been feared that the Government of the United States tended to a consolidation," a correspondent wrote in the *Virginia Argus*, "and consolidation would generate monarchy. Nothing can so soon produce the first as the establishment of the doctrine that the common law of England is the law of the United States; it renders the State Governments useless burthens; it gives the Federal Government and its Courts jurisdiction over every subject that has hitherto been supposed to belong to the States; instead of the General Government being instituted for particular purposes, it embraces every subject to which government can apply . . . ; the whole range of legislation and jurisprudence is within its omnipotent grasp." [1] This doctrine was, moreover, regarded by the Anti-Federalists as merely a portion of the general plan of the Federalist party to control the Judiciary; and its support by the Judiciary was considered merely further evidence of their devotion to Federalism. "Judges would not introduce so novel, so important and extensively dangerous doctrine unless they were well assured it was pleasing to and would be supported by the Government," wrote Charles Pinckney.[2] Jefferson, writing to Pinckney, expressed his views of the obnoxious jurisdiction so asserted by the Courts, as follows:

[1] *Virginia Argus*, Aug. 9, 1799.

[2] *Charleston City Gazette* (S. C.), Oct. 6, 1800, letter signed "Republican."

"I consider all the encroachments made on that (Constitution) heretofore as nothing, as mere retail stuff compared with the wholesale doctrine, that there is a common law in force in the United States of which and of all the cases within its provisions, their Courts have cognizance. It is complete consolidation. Ellsworth and Iredell have openly recognized it. Washington has squinted at it, and I have no doubt it has been decided to cram it down our throats." Writing to Edmund Randolph also, Jefferson said that: "Of all the doctrines which have ever been broached by the Federal Government, the novel one, of the common law being in force and cognizable as an existing law in their Courts, is to me the most formidable. All their other assumptions of un-given powers have been in the detail. The Bank Law, the Treaty Doctrine, the Sedition Act, the Alien Act, the undertaking to change the State laws of evidence by certain parts of the Stamp Act, etc., have been solitary, unconsequential, timid things, in comparison with the audacious, barefaced and sweeping pretension to a system of law for the United States, without the adoption of their Legislature, and so infinitely beyond their power to adopt. If this assumption be yielded to, the State Courts may be shut up." [1]

While the alarm of the Anti-Federalists over this wide jurisdiction claimed by the United States Courts was grave, their indignation was even deeper over the administration of the detested Sedition Law by the

[1] To Gideon Granger, Jefferson wrote, Aug. 18, 1800: "And I do verily believe that if the principle were to prevail of a common law being in force in the United States (which principle possesses the general government at once of all the powers of the State Governments and reduces us to a single consolidated government) it would become the most corrupt government on the earth." *Jefferson*, IX. See also letters of Aug. 18, 19, 1799, Oct. 29, 1799, June 12, 1817. James Monroe, writing to Breckenridge, expressed the hope that any opposition by the Judges to the sovereignty of the people such as "the application of the principles of the English common law to our Constitution", would be good cause for impeachment. *Breckenridge Papers MSS*, letter to Breckenridge, Jan. 18, 1802, *infra*, 229.

Judges of these Courts, and the upholding of the constitutionality of that Law by Judges Paterson and Chase in the trials of Mathew Lyon, Thomas Cooper, James Callender and others in 1799 and 1800 was regarded as a serious attack on the Constitution itself.[1] Moreover, the constant practice indulged in by the Judges of the United States Courts of expressing their views on political issues in charges to the grand juries was regarded by the Anti-Federalists as an outrageous extension of judicial power. Jefferson termed it "a perversion of the institution of the grand jury from a legal to a political engine."[2] "We have seen Judges who ought to be independent, converted into political partisans and like executive missionaries pronouncing political harangues throughout the United States" was the description of the situation given by an Anti-Federalist Congressman. This language was surely justified when a Judge of the Court deemed it proper to deliver a charge reported by the Federalist newspapers as "truly patriotic" as follows: "After some general reflections on the relative situation between the United States and France, the learned Judge went into a defence of the alien and sedition laws, and proved them, it is believed,

[1] See especially, *Marshall*, III, 3–45; *The Enforcement of the Alien and Sedition Laws*, by Frank Malley Anderson, *Amer. Hist. Ass. Report* (1912). In *Contemporary Opinion of the Virginia and Kentucky Resolutions*, by Frank Malley Anderson, *Amer. Hist. Rev.* (1899), X, it is said: "The Federalists manifested an utterly imperious and intolerant demeanour towards their Republican opponents and the imprisonment of (Abijah) Adams indicates that the Federalists were ready upon the slightest provocation to treat opposition to the policy of the Administration, whether Federal or State, as a crime. That case certainly does much to explain why Jefferson and other Republican leaders could fear that Republican institutions were about to be overthrown."

[2] *Jefferson*, VIII, letter to P. Fitzhugh, June 4, 1797; *7th Cong., 1st Sess.*, speech of William B. Giles in the House, Feb. 18, 1802. A letter to the *Independent Chronicle*, quoted in *Aurora*, June 21, 1802, spoke of Judges "itinerating through their Circuits and converting the holy seat of law, reason and equity into a rostrum from which they could harangue the populace under the artful pretence of instructing a grand jury, and excite an alarming fanaticism among them under cover of legal authority."

to the satisfaction of every unprejudiced mind to be perfectly consistent with the principles of the Constitution and to be founded on the wisest maxims of policy. The Judge concluded with calling the attention of the Grand Jury to the present situation of the country and with remarks on the mild and virtuous administration of the government." [1] The fact that such political charges were praised by the Federalist papers as "replete with sound principles and the very essence of Federalism", and as being "among the more vigorous productions of the American pen. . . . In these useful addresses to the jury, we not only discern legal information, conveyed in a style at once popular and condensed, but much *political* and *constitutional* knowledge",[2] served to enhance the indignation of the Anti-Federalists. And their apprehensions were not dispelled by the defense made by a Federalist Congressman, James A. Bayard, that though the Judges had been charged

[1] Charge to the Grand Jury in New Jersey by Judge Iredell, *Federal Gazette and Baltimore Daily Advertiser*, April 10, 1799.

[2] *Farmer's Weekly Museum* (Walpole, N. H.), Sept. 3, 1798, June 17, 1799. See also *Oracle of the Day* (Portsmouth, N. H.), May 26, 1788. In *New Jersey Gazette*, April 12, 1795, there is a report of a charge of Judge Iredell to the Circuit Court Grand Jury in New Jersey in which he gave at length his views on the Jay Treaty — a topic of excited political discussion; and the *Federal Gazette and Baltimore Daily Advertiser*, April 19, 1797, reports a charge of Judge Iredell to the Grand Jury in Pennsylvania, dealing with the duties of a citizen not to give "hostile assistance to any of the warring powers", — a subject on which there was heated political division; see *ibid.*, April 19, 1798, containing a letter praising a charge by Judge Chase. Judge Cushing in a charge to the Grand Jury in Virginia, Sept. 23, 1798, portrayed the horrors of the French Revolution and urged them to be on their guard against French wiles and "the plot against the rights of Nations and of mankind and against all religion, and virtue, order and decency." Judge Bay of the United States District Court in South Carolina, in a charge to the Grand Jury, Nov., 1798, praised President Adams, appealed for support to his Administration and denounced the "recalcitrant few" in South Carolina who indulged in partisan antagonism. *Carolina Gazette*, Dec. 27, 1798; *South Carolina Federalists*, in *Amer. Hist. Rev.* (1909). The *Oracle of the Day*, May 24, 1800, described "a most elegant and appropriate" charge of Judge Paterson: "The law was laid down in a masterly manner. Politics were set in their true light; by holding up the Jacobins as the disorganization of our happy country and the only instruments of introducing discontent and dissatisfaction among the well-meaning part of the community." The "Jacobins" thus referred to by the Judge were his political opponents, the Anti-Federalists.

"with having transgressed the bounds of judicial duty and become the apostles of a political sect, traveling about the country for little other purpose than to preach the Federal doctrines to the people", nevertheless, all that they had done was to unfold and explain the principles of the Constitution, to explain the laws, "and when some of the laws have been denounced by the enemies of the Administration as unconstitutional the Judges have felt themselves called upon to express their judgments upon that point and the reasons of their opinion." In retort to this defense, it was very properly said that it was not the business of the Judges to be concerned with the views, either of "friends" or of "enemies of the Administration."

The appointments by Presidents Washington and Adams of Jay and Ellsworth as Ambassadors had further served to convince the Anti-Federalists that the Judicial Bench was being made simply an annex to the Federalist party. "It (the Executive) has been able to draw into this vortex the Judiciary branch of the Government, and by their expectancy of sharing the other offices in the Executive gift to make them auxiliary to the Executive in all its views, instead of forming a balance between that and the Legislature, as it was originally intended," wrote Jefferson.[1] Madison vigorously opposed the practice. "It is an unwise and degrading situation for a National Judiciary," said Charles Pinckney in the Senate, in 1800; and to establish the independence of the Judges and free them from the control or interference of the Executive, he proposed

[1] *Jefferson*, VIII, 205, notes on Prof. Ebeling's letter of July 30, 1795. Writing to Madison, Dec. 28, 1794, *ibid.*, 156, Jefferson had said, relative to the new "infernal" excise law: "We shall see what the Court lawyers and Courtly Judges and would-be Ambassadors will make out of it." The notorious James T. Callender in *The Prospect Before Us* (1800), 83, wrote: "Think of the gross and audacious prostitution of the federal bench by the successive selection of foreign ambassadors from that body." *Madison*, VI, letter to Jefferson, March 15, 1800.

an Amendment to the Constitution providing that the United States Judges should hold no other appointment or office, and later he introduced a bill to accomplish the same end.[1]

During the great struggle for the Presidency in the fall of 1800, which resulted in the overthrow of the Federalist Party, and which produced a complete revolution in the political trend of the country, the general attitude of the Judges of the United States Courts had been one of the campaign issues. And as a consequence of the hostility towards the Federal Judiciary thus entertained by the Anti-Federalist Party, the Court, upon convening for the first Term to be held in the new city of Washington in February, 1801, entered upon a new period in its history. During the subsequent thirty-five years, it was destined to be the center of persistent political opposition, out of which, nevertheless, it was to emerge more fixedly established as an independent branch of the American Government, more potent a factor in the industrial, social and political development of the country, and more securely intrenched in the public confidence and respect.

[1] *6th Cong., 1st Sess.*, March 5, April 3, 1800. A similar Constitutional Amendment was introduced in the House by Livingston, of New York, Feb. 13, 1800. A resolution to provide for similar legislation was introduced into the House again in 1804. See *New York Daily Advertiser*, Feb. 7, 1804. Timothy Pickering wrote, May 19, 1828, on the Independence of the Judiciary: "Perhaps it might be expedient, to render this as perfect as any human institution can be, to declare, as an Amendment to the Constitution, that a Justice of the Supreme Court of the United States should be forever precluded from every other office and place under the General Government; either by the appointment of the Executive or Congress or the election of the people." *Pickering Papers MSS.*

CHAPTER FOUR

MARSHALL, JEFFERSON, AND THE JUDICIARY

1800–1802

When, in 1800, the Government was removed to Washington, the "Federal City", buildings had been erected for the use of the Executive and Legislative branches, of such size and elaboration as to have given rise to criticism in Congress that the White House and Capitol were "much too extravagant, more so than any palace in Europe"; that they were built in "extravagant style" and that "gentlemen blushed on account of the magnificence displayed."[1] For the third and coördinate branch of the Government, however, the Judiciary, no arrangement whatever had been made; and it was not until two weeks before the Court opened its first Term in Washington that Congress even provided a place in which its session could be held. The first official suggestion of a building for the Court in Washington seems to have been in 1796, when a Committee of the House of Representatives stated that "a building for the Judiciary" was among the objects yet to be accomplished in establishing the permanent seat of government.[2] A report in 1798 made by Alexander White, one of the Commissioners for

[1] *4th Cong., 1st Sess.*, Feb. 24, 1796. See speech of John Williams of New York, 366, speech of W. B. Giles of Virginia, 367, speech of Sylvanus Bourne of Massachusetts, 373, speech of Jeremiah Crabb of Maryland, 371.

[2] *Amer. State Papers, Misc.*, I, Nos. 70, 78, Jan. 26, 1796; *9th Cong., 2d Sess.*, 497. A note to a debate in Congress, Feb. 13, 1807, says: "In the original plan of the Capitol no room was provided for the Courts of the United States." *Claypoole's American Daily Advertiser*, Aug. 10, 1798.

the Federal City, stated that: "No plan having been agreed upon, or even proposed for a Judiciary (building), the sum of 100,000 dollars is suggested, merely for consideration; and the immediate erection of that edifice is not considered so essential as houses for the accommodation of Congress, of the President and the Executive offices." It was not until January 20, 1801, that any steps were actually taken to provide the Court with a place for its approaching session. "As no house has been provided for the Judiciary of the United States, we hope the Supreme Court may be accommodated with a room in the Capitol to hold its sessions until further provisions shall be made, an arrangement, however, which we would not presume to make without the approbation of Congress," was the mild suggestion of the District Commissioners to Congress;[1] and on the next day, January 21, the Senate resolved that: "The Secretary be directed to inform the Commissioners of the City of Washington that the Senate consent to the accommodation of the Supreme Court in one of the Committee rooms, as proposed in their letter." On January 23, a resolution was reported and passed: "That leave be given to the Commissioners of the City of Washington to use one of the rooms on the first floor of the Capitol for holding the present session of the Supreme Court of the United States."[2] It has been generally stated hitherto that the room assigned to the Court in 1801, and in which it sat throughout

[1] *Documentary History of the Construction and Development of the United States Capitol Building and Grounds* (1904), *58th Cong., 2d Sess., H. R. Report No. 646.*

[2] A further resolution was laid on the table and directed to be printed: "Resolved, that a suitable apartment or apartments in that part of the Capitol already finished ought to be fitted up for the temporary accommodation of the Courts of the United States, appointed or hereafter appointed to be held in such city, and of such Court, as may hereafter be appointed to be held therein for the Territory of Columbia, and in completing the Capitol permanent accommodation for the said Courts ought to be provided therein." *Senate Proc.*, Jan. 21, 1801, *Senate Journ.*, 116; *House Proc.*, of Jan. 23, 1801, *House Journ.*, 771, *6th Cong., 1st Sess.*

THE FIRST COURT-ROOM IN THE CAPITOL, 1801–1808, NOW THE OFFICE OF THE MARSHAL OF THE COURT

its early years, was the present Law Library room underneath the present Court-room.[1] Such, however, is not the case.[2] The North Wing, which was the only part of the Capitol then finished, consisted of a basement floor containing, on the east side, the east entrance hall and the Senate Chamber (the latter being a room 48 by 86 feet and 41 feet high, its gallery being on the same level with the present first floor of the Capitol); in the center of the basement floor was a grand stairway hall, and a Senate ante-chamber; and on the west side, four committee rooms. On the first floor, on the east side and over the east entrance hall, there was an office designated for the Senate Clerk; and on the west side, a House Clerk's office, and a large room (35 by 86 feet) devoted in the early years to the House of Representatives, and later to the Library of Congress. Over the Senate ante-chamber was the House ante-chamber (the hallway of the present Supreme Court), which to the west opened into the House and to the east opened into the Senate Gallery. The room which was assigned to the Court in 1801, and occupied by it until 1808, was that known as the Senate Clerk's Office (now occupied by the Marshal of the Court) located on the main or first floor, over the basement east entrance hall. In this small and undignified chamber, only 24 feet wide, 30 feet long and 21 feet high, and rounded at the south end, the Chief Justice of the United States and his Associates sat for eight years.

Before the date of the first session of the Court in Washington, Chief Justice Ellsworth, who was still

[1] See this misstatement in "The Supreme Court Room" in *Case and Comment* (1890), II, 97; in Woolworth's Speech before the Omaha Bar Ass'n, Feb. 4, 1901; in *Marshall's Life, Character and Judicial Service*, III, 32; in *The National Capitol* (1897), by G. C. Hazelton, Jr., 186; in *History of the Supreme Court* (1891), by Hampton L. Carson, 241; and in *Marshall*, III, 121, note.

[2] *History of the Capitol* (1900), by Glenn Brown, I, 24, 25, 28.

in France, resigned owing to ill health, and President Adams at once appointed as his successor the former Chief Justice, John Jay. "I have nominated you to your old station," he wrote on December 19, 1800. "This is as independent of the inconstancy of the people as it is of the will of a President. In the future administration of our country, the firmest security we can have against the effects of visionary schemes or fluctuating theories will be in a solid Judiciary; and nothing will cheer the hopes of the best men so much as your acceptance of this appointment. You have now a great opportunity to render a most signal service to your country. . . . I had no permission from you to take this step, but it appeared to me that Providence had thrown in my way an opportunity, not only of marking to the public the spot where, in my opinion, the greatest mass of worth remained collected in one individual, but of furnishing my country with the best security its inhabitants afforded against the increasing dissolution of morals."[1] Though his appointment was confirmed by the Senate and his commission actually issued, Jay declined the office, basing

[1] *Jay*, IV, letter to Adams, Jan. 2, 1801; *King*, III; *Works of John Adams*, IX. It appears that Samuel Sitgreaves of Pennsylvania was suggested by some for the position. "There is a newspaper report that Judge Ellsworth is about to resign," wrote Timothy Pickering to Rufus King, Dec. 27, 1800. "I should be gratified to see our friend Sitgreaves on the Bench. If Judge Ellsworth contemplated a resignation when at Paris, I hope he may have mentioned it to Mr. S. and that he may be authorized to recommend the latter to the President." Robert Troup wrote to King, Dec. 31, 1800, regarding the effect of Ellsworth's resignation upon the Federalist party, stating that Alexander Hamilton was regarded "as an unfit head of the party, being radically deficient in the quality of discretion" and that "we are in fact without a rallying point. I have for some time past consoled myself with the idea that Mr. Ellsworth would form a rallying point for us. This idea, however, has vanished with his resignation of the office of Chief Justice. We fear he is lost to public life forever." A New York letter to the *Aurora* had stated as early as May 2, 1800, that: "We expect to put Mr. Jay in the way for a Federal office. It is understood that his old station of Chief Justice would be given him as a make-peace, but Jay wishes to be Vice-President or President." On March 10, 1800, the *Aurora* had said that Adams' friends "proposed 'old Father Ellsworth' as his successor."

Jay was nominated Dec. 18, 1800, and confirmed Dec. 19.

his refusal largely on the failure of Congress to relieve the Judges from their onerous duty of sitting in the Circuit Courts. The original Judiciary Act, he wrote, was "in some respects, more accommodated to certain prejudices and sensibilities, than to the great and obvious principles of policy. Expectations were, nevertheless, entertained that it would be amended as the public mind became more composed and better informed; but those expectations have not been realized nor have we hitherto seen convincing indications of a disposition in Congress to realize them. On the contrary, the efforts repeatedly made to place the Judicial Department on a proper footing have proved fruitless. I left the Bench perfectly convinced that under a system so defective, it would not obtain the energy, weight and dignity which are essential to its affording due support to the National Government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence, I am induced to doubt both the propriety and the expediency of returning to the Bench, under the present system; especially as it would give some countenance to the neglect and indifference with which the opinions and remonstrances of the Judges on this important subject have been treated. . . . I find that, independent of other considerations, the state of my health removes every doubt, it being clearly and decidedly incompetent to the fatigues incident to the office."

The papers of the day paid little attention to the appointment of a new Chief Justice; but the *Aurora*, naturally adverse to Jay's political views, made the sarcastic comment that: "John Jay after having thru' decay of age become incompetent to discharge the duties of Governor, has been appointed to the sinecure of Chief Justice of the United States. That the

Chief Justiceship is a sinecure needs no other evidence than that in one case the duties were discharged by one person who resided at the same time in England, and by another during a year's residence in France." [1] The appointment met with an equal lack of enthusiasm from Jefferson, who wrote to Madison, December 19, 1800: "Ellsworth remains in France for the benefit of his health. He has resigned his office of C. J. Putting these two things together, we cannot misconstrue his views. He must have had confidence in Mr. A(dams') continuance, to risk such a certainty as he held. Jay was yesterday nominated Chief Justice. We were afraid of something worse." Such few Federalist newspapers as noticed the appointment at all greeted it with applause. "We are happy to find that this office, lately so ably filled by Judge Ellsworth, is about to devolve again on a character whose talents and abilities amply qualify him to preside with dignity to himself and honour to this country in the first Court in the United States," said one.[2] But the President's choice did not meet with universal approval from the leaders of his own party.[3] Oliver Wolcott wrote to Timothy Pickering, that as Jay had already declined a less arduous position on account of his advanced age, the nomination was deemed made in one of those "sportive humors for which our Chief is distinguished." Pickering wrote to Rufus King: "The President has nominated Mr. Jay to be Chief Justice in the room of Judge Ellsworth. The Senate of course ratified the nomination; but the President, as well as everybody else, must know that Mr. Jay will not accept the office. He formally announced to the Legislature of New York

[1] *Aurora*, Jan. 8, 1801.

[2] *Farmer's Weekly Museum*, Jan. 19, 1801.

[3] *Pickering Papers MSS*, letters of Dec. 9, 1800, Jan. 5, 1801; *King*, III; *Hamilton* (J. C. Hamilton's ed.) VI, letter of Gunn to Hamilton, Dec. 18, 1800.

his determination to retire from public life on account of his advanced age and *infirmities*. Under such circumstances, nobody but Mr. A. would have made the nomination without consulting Mr. Jay. . . . As Mr. Jay will certainly refuse the Chief Justiceship, I presume Judge Paterson will be appointed; and his vacancy, I am disposed to think, will be filled either from New York or Pennsylvania. If from the former, perhaps by Judge Lawrence." One of Hamilton's adherents wrote to him: "Either Judge Paterson or General Pinckney ought to have been appointed; but both those worthies were your friends." Failing to obtain Jay's acceptance and unwilling to consider the appointment of any man in the Hamiltonian faction of the Federalist party, President Adams surprised his associates and the country in general by sending to the Senate on January 20, 1801, as his second choice for Chief Justice, the name of his Secretary of State, John Marshall of Virginia. To Elias Boudinot of the New Jersey Bar, who had written that the Bar would like to see Adams himself in the position, Adams wrote that he was too old, too long away from active practice, and that he had nominated "a gentleman in the full vigor of middle age, in the full habits of business and whose reading of the science is fresh in his head." Marshall was forty-five years old, and, while having held no judicial office, had practiced at the Bar for twelve years with such success that, as early as 1796, Charles Lee had written to Washington that he was "at the head of his profession in Virginia." Most of the Federalist leaders, however, resented the nomination, believing that Judge Paterson should have been promoted to the Chief Justiceship, for which he was so eminently fitted. "I think it a pity," wrote James Hillhouse of Connecticut, "that the feelings

of so honorable and able a Judge should be wounded, as I have no doubt he will be, by having a younger lawyer, not more eminent in that line, put over his head." [1]

So strong was the feeling in the Senate against the nomination of Marshall that the Federalists were actually prepared to refuse to confirm him, if by such action they could have induced the President to appoint Paterson. Accordingly they postponed their vote for a week; but finding Adams inflexibly opposed to Paterson, they finally yielded, and the nomination was confirmed on January 27, 1801. The fact that John Marshall attained the Chief Justiceship, in the face of pronounced Federalist opposition, and only because of the obstinacy of John Adams, is not generally known, but is most interestingly pictured in a series of letters from Jonathan Dayton, the Senator from New Jersey, to Judge Paterson.[2] On the day of the nomination, Dayton wrote that it was "with grief, astonishment and almost indignation" that he informed Paterson of Marshall's nomination "contrary to the hopes and expectations of us all." "The eyes of all parties had been turned upon you, whose

[1] *Works of John Adams*, IX, 91, letter of Jan. 26, 1801; *Life and Letters of Simeon Baldwin* (1919), by Simeon E. Baldwin, letter of Jan. 31, 1801. Even so hostile a paper as the *Aurora* said that Judge Paterson had "ever been considered one of the ablest lawyers America has produced." Later, the *Aurora* stated that Paterson's failure to secure the nomination was due to certain Federalists who resented his decision in 1795 in holding unconstitutional a Pennsylvania statute enacted in favor of Connecticut settlers. *Aurora*, Jan. 24, 1801, Jan. 22, Sept. 20, 28, 1803.

[2] *Paterson Papers MSS*, transcript in New York Public Library, letters of Dayton to Paterson, Jan. 20, 28, Feb. 1, 1801, letter of Marshall to Paterson, Feb. 2, 1801.

James A. Bayard wrote, Jan. 28, 1801, to Andrew Bayard: "I see it denied in your papers that Mr. Marshall was nominated Chief Justice of the U. S. The fact is so, and will, without doubt, have the concurrence of the Senate. Some hesitation was at first expressed from a respect to the pretensions of Paterson." *James A. Bayard Papers* (1915). See also *History of the Administrations of Washington and Adams* (1846), by George Gibbs, II, 461; *King*, III, letter of Feb. 17, 1801.

pretensions we knew were in every respect the best, and who would have been the most acceptable to the country. Painful as it would be for the Senate to reject a man of such respectable talents and standing as Mr. Marshall unquestionably is, I am convinced, nevertheless, that they would do it, if they could be assured that thereby *you* would be called to fill it, and he brought upon the Bench as a Junior Judge"; and he continued by saying that Mr. Adams' whole conduct and nominations had manifested "such debility or derangement of intellect" as to convince the Federalists that another four years of his Administration would expose them to destruction. Eight days later, Dayton wrote that, on his motion, the Senate had postponed action, in order to ascertain "whether the President could be induced under any circumstances whatever to nominate you. If we could have been satisfied of this, we should have taken measures to prevail on Mr. Marshall to have, himself, declined the highest for a lower seat upon the Bench, or, in case of his refusal, have negatived him. This would have been a course of proceeding painful indeed to the Federalists on account of their esteem for that gentleman and their respect for his talents, and to which nothing could have brought them, but their very strong attachment for you and their very high sense of your superior title and pretensions. It must be gratifying to you to learn that all voices were united in favor of conferring this appointment upon you. The President alone was inflexible and declared that he would never nominate you. Under these circumstances, we thought it advisable to confirm Mr. Marshall, lest another not so well qualified and more disgusting to the Bench should be substituted, and because it appeared that this gentleman was not privy to his own

nomination, but had previously exerted his influence with the President on your behalf." [1]

On January 31, the Secretary of War, Samuel Dexter, acting *pro tempore* as Secretary of State, by direction of the President, signed the new Chief Justice's commission; and on February 4, the day that the Court convened, Marshall wrote to the President expressing his "grateful acknowledgment for the honor" and saying: "This additional and flattering mark of your good opinion has made an impression on my mind which time will not efface. I shall enter immediately on the duties of this office and hope never to give you occasion to regret having made this appointment."

Though Senator Dayton had termed Marshall's appointment a "wild freak" of President Adams, the latter never wavered in his confidence in the supreme fitness of his new Chief Justice. "My gift of John Marshall to the people of the United States was the proudest act of my life," he said to Marshall's son, twenty-five years later, and to another visitor: "There is no act of my life on which I reflect with more pleasure. I have given to my country a Judge, equal to a Hale, a Holt, or a Mansfield." [2] The party associates of the

[1] It appears from a letter of Dayton to Paterson, Feb. 1, 1801, that Paterson had written Feb. 25, saying that he felt "neither resentment nor disgust" at the appointment of Marshall, and good naturedly reproving Dayton for the warmth of temper of his letter. Dayton stated in his letter that "the dissatisfaction among the Members of Congress in consequence of your being thus passed by appeared to me universal, and this sensation probably derived greater strength from the apprehension that it might drive you from your seat upon the Bench, where all men of all parties were anxious that you should remain."

Marshall wrote to Paterson, Feb. 2, 1801, asking him to "accept my warm and sincere acknowledgment for your polite and friendly sentiments on the appointment with which I have been lately honored."

[2] See oration by John H. Bryan, Congressman from North Carolina, June 23, 1830, in *Niles Register*, XXXIX, 11. Judge Story, in his *Discourse on Marshall*, states also that John Quincy Adams wrote to a certain Judge: "One of the last acts of my father's Administration was the transmission of a commission to John Marshall as Chief Justice of the United States. One of the last acts of my Administration is the transmission of the enclosed commission to you. If neither of us had ever done anything else to deserve the approbation of our country and of pos-

new Chief Justice, however, did not share in Adams' view in 1801; and they little comprehended Marshall's breadth of vision or constructive power as a jurist and statesman. Thus Oliver Wolcott had written to Fisher Ames, in December, 1799, that Marshall was "doubtless a man of virtue and distinguished talents, but he will think much of the State of Virginia, and is too much disposed to govern the world according to rules of logic; he will read and expound the Constitution as if it were a penal statute, and will sometimes be embarrassed with doubts, of which his friends will not perceive the importance"; George Cabot had written to Timothy Pickering, in 1798: "Mr. Marshall, I know, has much to learn on the subject of a practicable system of free government for the United States. I believe, however, he is a man of so much good sense, that, with honest principles, he cannot fail to discern and pursue a right course, and therefore that he will eventually prove a great acquisition", and in 1800, he wrote of his "great talents and, I believe, great virtues. But I fear he is not yet a politician and has much to learn on the subject of practicable theories of free government."[1] Theodore Sedgwick wrote of Marshall, less than a year before his appointment: "He is a man of a very affectionate disposition, of great simplicity of manner, and honest and honorable in all his conduct. He is attached to pleasures, with convivial habits strongly fixed. He is indolent therefore and indisposed to take part in the common business of the house. He has a strong attachment to popularity but indisposed to sacrifice to it his integrity; hence it is that he is disposed on all popular subjects to feel the public

terity, I would proudly claim it of both for these acts as due to my father and myself."

[1] *Life and Letters of George Cabot* (1877), by Henry Cabot Lodge, letter of Cabot to Pickering, Oct. 31, 1798, letter of Cabot to Gore, Jan. 21, 1800.

pulse, and hence results indecision and an expression of doubt. . . . This gentleman, when aroused, has strong reasoning powers, they are indeed almost unequalled." [1] Fisher Ames could not pardon Marshall's disapproval of the Alien and Sedition laws and wrote: "Excuses may palliate; future zeal in the cause may partially atone; but his character is done for. . . . False Federalists or such as act wrong from false fears should be dealt hardly with, if I were Jupiter Tonans." On the other hand, Jeremiah Smith had written that he placed "great confidence in Marshall as a true patriot and a discerning man." [2] Washington had written that he had "a high opinion of General Marshall's honor, prudence and judgment"; and since it was due to his special request that Marshall became a candidate for Congress and was thus brought into close contact with President Adams, it may justly be said that it was primarily to Washington that the country owed its great Chief Justice.[3]

But, though some of his contemporaries were not enthusiastic in their estimation of Marshall as a statesman, he was ranked as a lawyer among the three or four leaders of the Virginia Bar. Of these leaders, wrote a fellow member of the Bar in 1796,

[1] *King*, III, letter of Sedgwick to King, May 11, 1800; *Works of Fisher Ames*, I, letter of Dec. 18, 1798, to Christopher Gore; see also letter of Cabot to King, April 26, 1799: "Marshall ought not to be attacked in the newspapers nor too severely condemned anywhere, because Marshall has not yet learned his whole lesson, but has a mind and disposition which can hardly fail to make him presently an accomplished political scholar and a very useful man. Some allowance too, should be made for the influence of the atmosphere of Virginia, which doubtless makes everyone who breathes it visionary and, upon the subject of free government, incredibly credulous; but it is certain that Marshall at Philadelphia would become a most powerful auxiliary to the cause of order and good government, and therefore we ought not to diminish his fame, which would ultimately be a loss to ourselves."

[2] *Life of Jeremiah Smith* (1845), by John H. Morison, letter of June 27, 1798; *Washington*, XII, letter to Edward Carrington, Oct. 9, 1795.

[3] See especially interesting account of Washington's conference with Marshall and Bushrod Washington, in 1798, in *Autobiography of Martin Van Buren* in *Amer. Hist. Ass. Rep.* (1918), II.

James Innes, the Attorney-General of Virginia, "ranks first in genius, in force of thought, in power of expression, and in effect of voice and manner"; "public opinion gives the next rank as an orator to Edmund Randolph", and "John Marshall (a general of militia) is inferior in voice and manner, but for talent, he substitutes genius, and instead of talking *about* his subject, he talks upon it. He possesses neither the energy of expression nor the sublimity of imagination of Innes, but he is superior to every other orator at the Bar of Virginia, in closeness of argument, in his most surprising talent of placing his case in that point of view suited to the purpose he aims at, throwing a blaze of light upon it, and of keeping the attention of his hearers fixed upon the object to which he originally directed it. He speaks like a man of plain common sense, while he delights and informs the acute. In a less captivating line of oratory than that which signalizes Innes, he is equally great and equally successful. *The jury obeys Innes from inclination, Marshall from duty.*" [1] Another contemporary well summed up Marshall's peculiar powers by describing the "irresistible cogency and luminous simplicity in the order of his reasoning."

By many of his political opponents, Marshall was held in slight estimation, and in the *Aurora*, in 1800, he had been characterized as "more distinguished as a rhetorician and sophist than as a lawyer and statesman, sufficiently pliant to succeed in a corrupt court, too insincere to command respect or confidence in a republic." [2] Jefferson had long been at variance with him,

[1] *John H. B. Latrobe and his Times 1803–1891* (1919), by John E. Semmes, II, 177–181, 191–197, letter of Benjamin H. Latrobe, May 31, 1796; this account is not cited by Beveridge, who otherwise gives full quotations from contemporary writers as to Marshall's position at the Bar. *Marshall*, II.

[2] *Aurora*, June 12, 1800.

and, writing to Madison in 1798, had said that his "lax, lounging manners have made him popular with the bulk of the people of Richmond, and a profound hypocrisy, with many thinking men of our country. But, having come forth in the plenitude of his English principles, the latter will see that it is high time to make him known." To Monroe he had written in 1800 that "nothing should be spared to eradicate this spirit of Marshallism." [1] Moreover, Jefferson had an especial ground for distrust of Marshall at this particular time; for the report had become widely circulated, during the contest in Congress between Burr and Jefferson for the Presidency, that Marshall had given a legal opinion that Congress under certain contingencies might appoint a President, and it was rumored that the Chief Justice of the United States was to be selected. "We are told that the intention is to place the Chief Justice in the Presidential Chair and that John Jay was recommended in the spirit and body of this plan," said one newspaper.[2] "There

[1] *Jefferson*, letter to Madison, Nov. 26, 1798; *Works of Thomas Jefferson* (ed. by A. G. Lipscomb, 1903), XIX, letter to James Monroe, April 12, 1800. Judge Story reported Jefferson as saying: "When conversing with Marshall, I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. So great is his sophistry you must never give him an affirmative answer or you will be forced to grant his conclusion. Why, if he were to ask me if it were daylight or not, I'd reply, 'Sir, I don't know, I can't tell.' " *Life of Rutherford Birchard Hayes* (1914), by Charles R. Williams, diary entry of Sept. 20, 1843.

[2] *Salem Gazette*, Jan. 16, 1801. The *Aurora*, Jan. 10, 15, 1801, stated that in the event that the House of Representatives were unable to arrive at a choice by March 4, 1801, some of the chief Federalists who had assembled at the house of Judge Chase in Baltimore had devised a plan to retain possession of the Government by a bill to put the Chief Justice in the Presidential Chair. Monroe wrote from Richmond, Jan. 6, 1801, to Jefferson: "Strange reports circulatory here . . . that Federalism means to commit the power by a Legislative act to John Marshall, Samuel A. Otis, or some other person till another election." On Jan. 18, 1801, he wrote: "It is said here that Marshall has given an opinion in conversation with Stoddard that in case 9 States should not unite in favor of one of the persons chosen, the Legislature may appoint a President till another election is made, and that intrigues are carrying to place us in that situation. This is stated in a letter from

has been much alarm at the intimation of such a projected usurpation, and much consultation, and a spirit fully manifested not to submit to it," wrote Monroe to Jefferson on January 18, 1801, two days before Marshall's nomination as Chief Justice. These rumors, whether true or false, and the known fact that Marshall, while taking no active part, was not entirely averse to the election of Burr to the Presidency, very naturally increased the new President's personal prejudice against the new Chief Justice.[1] It is entirely probable also that Jefferson was aware of Marshall's personal views. "To Mr. Jefferson . . . I have felt almost insuperable objections," Marshall wrote to Hamilton. "His foreign prejudices seem to me totally to unfit him for the chief magistracy. . . . In addition to this solid and immovable objection, Mr. Jefferson appears to me to be a man who will embody himself with the House of Representatives. By weakening the office of President, he will increase his personal power. He will

one of the representatives (I think Randolph) and has excited the utmost indignation in the Legislature."

The *Connecticut Courant*, March 23, 1801, contained an account of an interview with James Hillhouse, late President pro-tem of the Senate, stating that these rumors as to projected action of Congress were utterly false and that he never heard of the plan reported by the *Aurora*, until the *Aurora* published it.

[1] See *Marshall*, II, 542. As to Marshall's views relative to the election and Burr, see articles *Washington Federalist*, Jan. 6, 21, 25, Feb. 6, 12, 1801, which it was generally supposed (and with some reason, as Beveridge believes) were either written or inspired by Marshall.

The coolness existing between the Chief Justice and the President, after the latter's election, may be inferred from the following amusing reference. The *Washington Federalist*, quoted in *Columbian Centinel*, Aug. 29, 1801, stated: "There was such a gang of strange beings continually haunting the President's house, crying More, More! Give, Give! that the President thought proper to decamp. The presence of the Chief Justice perhaps had some effect in hastening his departure." The *National Aegis*, Dec. 12, 1801, charged Marshall with being "the malignant enemy of the President." The *Aurora's* Washington correspondent, March 8, 1805, describing Jefferson's second inauguration, wrote: "The President and Vice-President were sworn in today. The concourse of spectators was immense. Four of the Judges of the Supreme Court, Chief Justice Marshall, Cushing, Paterson and Washington; and *I observed that the Judge did not turn his back upon the President whilst administering the oath as he did this day four years ago.*"

diminish his responsibility, sap the fundamental principles of the government. . . . The morals of the author of the letter to Mazzei cannot be pure." [1]

The newspapers of the country showed little interest and paid very slight attention to the appointment of Marshall. A leading Federalist paper, the *Columbian Centinel*, published only the following comment: "The assent of the Senate to the nomination of the Hon. Mr. Marshall to be Chief Justice of the United States was unanimous. We expect the Jacobins at some future period will deny having abused this gentleman also." Of the leading Anti-Federalist papers, the *Independent Chronicle* noted the appointment without making any comment, and the *Aurora* printed only a brief sarcastic item: "The vacant Chief Justiceship is to be conferred on John Marshall, one time General, afterwards Ambassador to X, Y, Z, and for a short time incumbent of the office of Secretary of State." [2]

When the first Term to be held in the new city of Washington opened on February 2, 1801, William Cushing was the only Judge who had arrived; accordingly, the Court was adjourned, and it was not until February 4 (after Samuel Chase of Maryland and Bushrod

[1] *Hamilton* (J. C. Hamilton's ed.), VI, letter of Jan. 1, 1801. It is singular that Marshall feared lest Jefferson would "weaken" the office of President, whereas the chief attack upon Jefferson by the Federalists during the next eight years was for his aggrandizement and usurpation of Executive power.

[2] *Columbian Centinel*, Feb. 14, 1801; *Aurora*, Jan. 22, 1801. The *Independent Chronicle*, Jan. 29, 1801, published a hostile paragraph directed at the *Washington Federalist*, a gazette published "under the immediate patronage of General Marshall, the Secretary of State, which discharges a great deal of low abuse at Mr. Jefferson. . . . Who would think that John Marshall, once the fervent worshipper at the altar of Liberty, would become the abuser of Jefferson. 'Tis true, 'tis pity, Pity 'tis, 'tis true." The *Aurora*, April 30, 1801, referred to the *Washington Federalist* as "set up by John Marshall and supported by his credit in the banks of the Columbian District."

James Callender, who had been indicted under the Sedition Act during President Adams' Administration for a savage diatribe on the President, wrote in the *Richmond Enquirer*, Feb. 6, 1801: "We are to have that precious acquisition, John Marshall, as Chief Justice. . . . The very sound of the man's name is an insult upon truth and justice."

Washington of Virginia appeared) that the session began and John Marshall took the oath of office. The installation of the new Chief Justice attracted no attention and was not described, or even noticed, in letters of the day or in the public press, the leading Washington newspaper printing only the following meager reference: "The Justices of the Supreme Court have made a court, the following Justices being present, viz. Marshall, Cushing, Chase and Washington." [1]

While no cases are reported as decided at this Term, it was marked, nevertheless, by a political episode which had a most potent effect upon the future history of the Court. On February 17, the long and closely contested balloting for President in the House of Representatives resulted in the election of Jefferson. Four days before that event, nine days after Chief Justice Marshall took his seat on the Bench, and only three weeks before President Adams was to retire from office, the Federalist Congress enacted the Circuit Court Act of February 13, 1801, changing the entire Judiciary system of the United States. Had this measure been adopted at an earlier period and under less partisan auspices, there would have been strong arguments in its favor, for it brought about a reform long recognized as desirable. From the very outset of the Government, there had been much dissatisfaction with that provision of the Judiciary Act which required the Judges of the Supreme Court to sit in the United

[1] *National Intelligencer*, Feb. 5, 1801. James A. Bayard (then a Congressman from Delaware) in writing an account of the Term did not mention the new Chief Justice and said: "I was occupied two or three days, in the hours of Congressional leisure, in preparing myself for the argument of a cause in the Supreme Court of the United States — *Silas Talbot* v. *Hans Fred Seaman*. The cause went off, I have received three hundred dollars and in consequence will be obliged to return again next August. The Court was attended by several lawyers from Philadelphia and the Maryland lawyers." *James A. Bayard Papers* (1915), letter of Feb. 6, 1801.

States Circuit Courts. The Judges had formally voiced their protests on several occasions.[1] The Attorney-General, and President Washington himself, had urged upon Congress the desirability of relieving the Judges of this duty. With this in view, President Adams, at the opening of the Sixth Congress in 1799, had strongly recommended such a revision and amendment of the Judiciary Act as "indispensably necessary." In accordance with the recommendation, a Committee of the House of Representatives was appointed, which reported a bill, March 11, 1800, said to have been prepared, the year before, by Hamilton. This bill justifiably alarmed the Anti-Federalists, for it provided for a division of the United States into twenty-nine districts, to each of which a new distinctive name was given, regardless of State names and State boundaries. "An attempt of an extraordinary nature to annihilate the State governments," they termed it.[2] Action on this bill having been postponed by the House, another measure, less radical in its nature, was reported, which passed the House, January 20, 1801, relieving the Supreme Court of all Circuit Court duty, reducing the number of Judges to five and establishing six new Circuit Courts with sixteen separate Judges. The Anti-Federalists again received the measure with indignant hostility. They took the ground that the volume of business in the present Federal Courts did not warrant any such increase of judicial tribunals; that the bill created a host of new Federal official positions to be filled;[3] and that so great an increase of

[1] *Amer. State Papers, Misc.*, I, 77; see *supra*, 85–90.

[2] *Life of Nathaniel Macon* (1903), by William E. Dodd; *Aurora*, March 24, April 17, 1800; *Independent Chronicle*, Oct. 27, 30, 1800; *Connecticut Courant*, Jan. 26, 1801.

[3] See interesting article by Max Farrand on *The Judiciary Act of 1801*, in *Amer. Hist. Rev.* (1900), I, 682, controverting the statements of historians as to the obnoxious character of the statute.

Federal power was an infringement upon the rights of the States and another step towards the consolidated Government so long dreaded by them.[1] "We have been asked if we are afraid of having an army of Judges," said Senator Jackson of Georgia, in a debate. "For myself, I am more afraid of an army of Judges under the patronage of the President than of an army of soldiers. The former can do us more harm. They may deprive us of our liberties, if attached to the Executive, from their decisions, and from the tenure of office contended for we cannot remove them."[2] The *Aurora* said: "One of the most expensive and extravagant, the most insidious and unnecessary schemes that has been conceived by the Federal party is now before Congress under the name of the Judiciary Bill, but which might with greater propriety be called a bill for providing sinecure places and pensions for thoroughgoing Federal partisans." A prominent Massachusetts Anti-Federalist, Benjamin Austin, wrote:[3] "This extensive machine, moving under the weight of a column of supernumerary Judges, attended with the immense expense

[1] Fisher Ames, the most conservative Federalist, had written, Dec. 29, 1799: "The steady men in Congress will attempt to extend the Judiciary Department. . . . There is no way to combat the State opposition, but by an efficient and extended organization of Judges, magistrates and civil officers," quoted in *Harrison Gray Otis* (1903), by Samuel E. Morison, I, 202. Alexander Hamilton, in a letter to Jonathan Dayton, in 1799, had advocated an even greater extension of the Federal Judiciary, saying: "Amidst such serious indications of hostility, the safety and the duty of the supporters of the government call upon them to adopt vigorous measures of counteraction. . . . Possessing, as they now do, all the constitutional powers, it will be an unpardonable mistake on their part, if they do not exert them to surround the Constitution with more ramparts and to disconcert the schemes of its enemies. The measures proper to be adopted. . . . First, establishments which will extend the influence and promote the popularity of the government. . . . The extension of the Judiciary system ought to embrace two objects; one, the subdivision of each State into small districts (suppose Connecticut into four, and so on in proportion) assigning to each a Judge with a moderate salary; the other, the appointment in each county of conservators or justices of the peace with very ministerial functions and with no other compensation than fees for the services they shall perform." *Hamilton*, X, 329.

[2] *7th Cong., 1st Sess.*, 47.

[3] *Aurora*, Jan. 21, 1801; *Independent Chronicle*, Dec. 24, 1801.

of their establishments, it is feared would ultimately reduce the people to the utmost state of irritation." The chief alarm of the Anti-Federalists, however, was over the fact that all these positions would probably be filled with Federalists by President Adams before he went out of office. They soon found their worst fears fully realized. The bill was enacted into law on February 13, 1801; within thirteen days, Adams sent to the Senate a complete list of nominations for the new Judgeships, chosen practically entirely from members of his own party; and by March 2, the Senate had confirmed the last name.[1] The appointment of these Judges who, from the fact that many of the commissions were filled out on the last day of Adams' term of office, became derisively known as the "Midnight Judges", naturally caused intense indignation to Jefferson and all his party. The criticism in the Republican newspapers was widespread and savage. That "Mr. Adams is laying the foundation of future faction and his own shame" was the common comment. "The close of Mr. Adams' Administration was marked with all the folly and wickedness that it was ever distinguished for," wrote Wilson C. Nicholas to John Breckenridge of Kentucky. "The Judiciary bill has been crammed down our throats, without a word or a letter being suffered to be altered," wrote Stevens Thomson Mason. "A new Judiciary system has been adopted with a view to make permanent provision for such of the Federalists and Tories as cannot hope

[1] For the Federalist view of the merits of this statute, see letters of Robert Goodloe Harper, May 16, 1800, Feb. 26, 1801, *James A. Bayard Papers* (1915). For list of the "Midnight Judges" see *Amer. Law Rev.*, X, 403; *History of American Bar* (1911), by Charles Warren, 352. Of the sixteen Circuit Judges, six were promoted from the position of District Judge, and to the vacant District Judgeships thereby created, three Senators and one Representative were named. Two Representatives also were appointed as District Attorneys in place of two of these officials who were appointed as Judges. *The Judiciary Act of 1801*, by Max Farrand, *Amer. Hist. Rev.* (1900), I; *Aurora*, Feb. 24, 1801.

to continue in office under the new Administration. Among these, John Marshall and Charles Lee are provided for; Marshall's brother-in-law is also nominated, and I expect some of his Kentucky connections will be remembered when the nominations are made." "It is a law which may be considered as the last effort of the most wicked, insidious and turbulent faction that ever disgraced our political annals," wrote another correspondent from Kentucky, "the *ne plus ultra* of an expiring faction to enthral the measures likely to be pursued by the new Administration, and to serve as one of the principal cogs in the wheel of consolidation."[1] One feature of the statute was regarded by President-elect Jefferson as aimed directly at himself and as an intentional diminution of his powers, namely, the reduction of the number of the Court from six to five, by providing that when the next vacancy occurred it should not be filled. As Judge Cushing, who was an elderly man and in extremely bad health, might naturally be expected to resign within a short time, the restriction on his replacement by Jefferson bore, quite reasonably, the aspect of an attempt to keep the Court wholly Federalist.

On March 4, 1801 (after twelve years of Federalist administration), political control of the United States passed into the hands of the Anti-Federalist party (now becoming known as Republican). "The Administration of Mr. Jefferson will be that of Reason and Virtue. The time seems to have returned when Republicanism, pure and undefiled, will evince its infinite value to social felicity," wrote Bishop James

[1] *Breckenridge Papers MSS*, letters of Nicholas, April 15, 1801, Mason, Feb. 12, 29, 1801, James Hopkins, Feb. 18, March 27, 1802. *Salem Register*, Feb. 4, 1812: "This celebrated act was scrambled into the House and hurried out as a law, to the disgrace of its framers."

Madison of Virginia to John Breckenridge.[1] But while in possession of the Executive and Legislative branches of the Government, the Republicans had no representative whatever in the Judicial branch, and such exclusion had a profound effect upon the history of the country. As has been seen, the distrust of the United States Courts by the Anti-Federalists had been rapidly increasing during the past years; and the decisions and actions of the Judges, adverse to practically every cardinal Anti-Federalist doctrine, and supporting the political tenets of the Federalist party, had gradually caused them to regard these Courts as a mere annex of that party. The Anti-Federalists had favored the confiscation of British debts; the United States Courts had denied the validity of State confiscation and had enforced the payment of these debts. The Anti-Federalists had opposed the carriage tax of President Adams, claiming it was a direct tax and unconstitutional; the United States Courts had sustained the tax.[2] The Anti-Federalists had been pro-French and unneutral; the United States Courts, on the other hand, persistently upheld their jurisdiction to enforce the international obligations of this country as a neutral. The United States Courts had sustained the English common law denying the right of expatriation — a doctrine which was anathema to the anti-English party in the United States. The

[1] *Breckenridge Papers MSS*, letter of May 26, 1801.

[2] As was said in the *Columbian Centinel*, Feb. 4, 11, 1801, in articles explaining hostility to the Judiciary: "The State Courts invariably decided against the recovery of British debts due from the people of Virginia. As soon as the Federal Courts met, British debts were (as they ought to have been) recovered. Is it strange that the Southern Jacobins should hate the Judiciary of the United States?" "They opposed the carriage tax as unconstitutional. Why?" asked the *Centinel* sarcastically. "Because the democratic Lords of Virginia had ten carriages where the aristocratic husbandmen and yeomen of New England one." For the effect of the carriage tax, see especially debate in the House, March 18–22, 1802. *7th Cong., 1st Sess.*

action of the United States Courts in asserting a jurisdiction to try persons indicted at common law was regarded by the Anti-Federalists as an extension of Federal authority and a prostration of State sovereignty not to be tolerated. Beyond all else, the upholding of the constitutionality of the Alien and Sedition laws by the Judges on Circuit had aroused the furious indignation of the Anti-Federalists, and had led them to charge that the Judiciary was merely a tool of the Federalist Executive and Legislature. "The Federal Judges were partial, vindictive, and cruel," the Anti-Federalist papers stated. "They obeyed the President rather than the law, and made their reason subservient to their passion." [1] "The Courts in this State (Pennsylvania) and the States Northward and Eastward are stretching the doctrines of treason and sedition to a most extraordinary length," wrote Mason to Monroe. "They seem determined to suppress all political enquiry, conscious that the conduct of their friend J. A. cannot stand a fair scrutiny." The political charges to the Grand Jury indulged in by the Judges had given great offense to the Anti-Federalists; and the appointments of two Chief Justices on foreign missions had induced a fear lest by this means the Judiciary was being subjected to the direction of the Executive. Moreover, the Anti-Federalists had been justly alarmed at the demands for centralization of Government voiced by their opponents in connection with the Judiciary; for since the Presidential campaign of 1800, the Federalist newspapers had been filled with articles demanding extension of the "protecting powers of the Federal

[1] *American Citizen*, April 23, 1803; *Monroe Papers MSS*, letter of Stevens Thomson Mason to James Monroe, April 29, 1800, in which the trial of Thomas Cooper was termed a "cruel and abominable persecution."

Judiciary" to the fullest limits authorized by the Constitution. "The Judiciary is the most important branch of the Government in relation to its effects on the habits and feelings of people. . . . If free governments can ever be maintained without a standing army, it can only be effected by a firm, independent and extensive Judiciary which shall bring the authority of the law home to the fireside of every individual," said one. "It is necessary to strengthen the Government in the affections of the people by multiplying Federal Courts; the State Courts are more or less infected with Anti-Federalism; in the extension of the Federal Courts lies the safety of the Federal Government," said another.[1]

Such being the many, and in some cases, well-grounded causes of apprehensions entertained by the Anti-Federalists, it was natural that they should regard the erection and appointment of the new Judiciary under the Circuit Court Act of 1801 as merely another attempt to intrench the Federalist party, and to propagate Federalist political principles by means of a new set of Judges.

They were convinced that the Federalists, having lost the election, were making a last desperate effort to retain a remnant of power in the judicial branch of the government, and they could quote Federalist authority for this belief. "Harper boasts that it (the Cir-

[1] See *Columbian Centinel*, Jan. 14, 31, Feb. 4, 7, 18, 1801, articles by "The Consistent Federalist", saying: "Unhappily a mistaken timidity and a disposition, too prevalent during the first years of the existence of our government to conciliate the opposition, led the First Congress not to invest the Federal Judiciary with the powers which the Constitution authorized them to bestow. The error has been deeply felt and sincerely lamented. The Judiciary, the most imposing, authoritative and generally the most popular branch, has been scarcely felt. It only appears now and than as a phenomenon which the people gaze at, but which they consider as a foreign intruder rather than the 'venerable image of their country's honor.' The principle of Federalism has ever been, and yet is, to extend the force and influence of the Judiciary to all the cases which are enumerated in the Constitution." See also *Washington Federalist*, Jan. 26, 28, 30, 1801.

cuit Court Act) is as good to the party as an election," a Washington correspondent of the *Aurora* had written; and General Harry Lee had said that "it is the only resource which the Government would have to secure strength, since the standing army could not be retained." Regarding this measure, therefore, as a mere partisan move, Jefferson and his party leaders were determined upon its repeal as soon as the new Congress should convene. Within ten days after his inauguration, Jefferson wrote that the principal Federalists "have retreated into the Judiciary as a stronghold, the tenure of which renders it difficult to dislodge them." Within three weeks after his inauguration, he wrote that while the Supreme Court was "so decidedly Federal and irremovable", the new Circuit Judges would remain in office only until the recent statute could be repealed; and later, he wrote that such action was necessary, since "the Federalists have retired into the Judiciary as a stronghold . . . and from that battery all the works of republicanism are to be beaten down and erased." And Jefferson's views were echoed by William B. Giles, who wrote that the Federalists "saw their doom approaching" and selected the Judiciary Department "in which they could entrench themselves. . . . The Judiciary has been filled with men who had manifested the most indecorous zeal in favor of the principles of the Federal party." Others of his party associates warmly supported his intended course. "It is generally expected," wrote Elbridge Gerry to Jefferson as early as May, 1801, "that among the first acts of the next Congress will be a repeal of the extraordinary judicial bill, the design of which was too palpable to elude common observation." [1] "What con-

[1] *Aurora*, Feb. 28, 1801; speech of Giles, *7th Cong., 1st Sess.*, 581, 590; *Jefferson*, IX, letters to Joel Barlow, March 14, 1801, and to Giles, March 23, 1801; *Writings*

cerns us most," wrote Giles, in June, is "the situation of the Judiciary as now organized. It is constantly asserted that the revolution is incomplete, as long as that strong fortress is in possession of the enemy; and it is surely a most singular circumstance that the public sentiment should have forced itself into the Legislative and Executive Department, and that the Judiciary should not only not acknowledge its influence, but should pride itself in resisting its will, under the misapplied idea of 'independence.' . . . No remedy is competent to redress the evil but an absolute repeal of the whole Judiciary system, terminating the present offices and creating a new system, defining the common law doctrine and restraining to the proper constitutional extent the jurisdiction of the Courts." [1]

Before the next Congress met, however, three additional episodes occurred in connection with the Judiciary which strongly reinforced this determination of Jefferson and the Republicans to effect a change in the judicial system and to curb the power of the Courts.

of Thomas Jefferson (H. A. Washington's ed.), letter to Dickinson, Dec. 19, 1801; *Some Letters of Elbridge Gerry, 1784–1804* (1896), letter of May 4, 1801, Feb. 18, 1802, "The Adams Judiciary was created for party purposes." *Independent Chronicle,* Nov. 25, 1801. "Among the causes which have sunk the anglo-federal party into contempt and disrepute is the dislike and abhorrence to independent Judges", *Aurora,* June 18, 1800. See also *Times and Alexandria Advertiser* (Va.), Dec. 15, 1798.

[1] *Jefferson Papers MSS,* letter of Giles, June 1, 1801; *William Branch Giles* (1914), by Dice Robins Anderson. See *Office Seeking during Jefferson's Administration,* by Gaillard Hunt, in *Amer. Hist. Rev.* (1898), II, quoting a letter from an influential man in Charleston, S. C., to Jefferson, July 24, 1801: "As a party the Federalists are not formidable; they are composed of trifling lawyers, men swoln with pride, ignorance and impudence, fellows thirsting for gain . . . and all the tories and their descendants. The Judiciary is also inimical, but I fear the only purifier of this engine is time; as the Judges die off, the Government must be careful to replace honest men in the room of the present set of flexible gentry; until these desirable events take place, they must be watched well." "In our state of society, the 'friends of order' calculate on many other barriers to republicanism *viz.,* a majority of the Senate, all the Federal Judges and most other officers of the United States on their side." *Oration delivered in Wallingford, March 11, 1801, before Republicans of the State of Connecticut at Their General Thanksgiving for the Election of Thomas Jefferson* (1801), by Abraham Bishop.

The first of these episodes was an extraordinary move on the part of two of the Judges of the new Circuit Court for the District of Columbia at their first session in June, 1801, in instructing the District Attorney to institute a prosecution for libel against the editor of the Administration paper, the *National Intelligencer*, because of its publication of a letter signed by "A friend to impartial justice", containing a gross attack on the Judiciary.[1] As both of these Judges, William Cranch and James M. Marshall, were Federalists and among President Adams' late appointments, and as William Kilty, the Republican Chief Justice of the Court, refused to join in the action, the case at once assumed a political character. The Republican District Attorney whose views, as he informed the Court, were "inimical to the interposition of the Court", declined to have anything to do with the business further than, as the officer of the Court, to hand the paper in question to the Grand Jury and to express to it the sentiments of the different members of the Court as well as his own. That the letter in question contained extremely violent and false views as to the Federal Judges was clear, but that it also fairly represented beliefs very generally entertained by the Republicans was also indubitable. "Our Courts with scarcely an exception," said the writer, "have been prompt to seize every occasion of aggrandizing Executive power, of destroying all freedom of opinion, of executing unconstitutional laws, and of inculcating by the wanton

[1] As to details of this episode hitherto unnoted by historians, see *National Intelligencer*, June 12, Nov. 18, 1801; *Aurora*, Oct. 28, 1801; *Columbian Centinel*, July 6, 1801; *Independent Chronicle*, June 25, July 9, Sept. 7, 14, Nov. 5, 9, 1801; *Boston Gazette*, Sept. 10, 1801. The *Boston Gazette*, July 20, 1801, and the *Columbian Centinel*, July 22, 1801, stated that the author of the libel was one of Jefferson's new appointees as United States Attorney. A writer in the *Charleston Gazette* stated that it is "said to have been written by a Secretary of State to shield you (Jefferson) from the indignation of an injured people." See *Connecticut Courant*, Aug. 17, 1801.

and unsolicited diffusion of heterodox policies the doctrines of passive obedience and non-resistance." He pointed out that, though the people had in the late election shown their disapproval of Federal policies, the Federal Judges had shown their hostility to any change; and he pictured the condition which Jefferson found on coming into office, "the bias of preconceived and perhaps immutable ideas possessed by the Judges, ideas which, not confined exclusively to a devotion to certain political tenets, involved in their wide range strong personal regards and antipathies. . . . He found the asylum of justice impure; there where reason and truth, unagitated and unimpaired even by suspicion, ought to preserve a perpetual reign, he contemplated the dominance of political and personal prejudice, habitually employed in preparing or executing party vengeance." In demanding prosecution for such sentiments, Judge James M. Marshall from the bench stated that "he was a friend to the freedom, but an enemy to the licentiousness of the press; that the printers in this country, on both sides of the politics which agitated the public mind, had taken the most unwarranted liberties, and descended to the most shameful scurrility and abuse; it was difficult to say on which side of the question they had been the most abusive; and that so long as he remained upon the Bench, it should be his particular care to restrain these abuses on the one side or the other." [1] To the demand of the Judges, the Grand Jury responded by returning a presentment of the editor. Finally, after a dec-

[1] See *Connecticut Courant*, Aug. 17, 1801, quoting letter in *Charleston Gazette* addressed by "Americanus" to Jefferson: "The serious charges of corruption exhibited against our National Judges by that publication are in a proper train of investigation. It is devoutly to be wished that the publisher may be punished and the author detected. If the latter should be found to be among your civil advisers, it will be a tribute of respect to the Judiciary to discard him from your privy council."

lination by the District Attorney to comply with an order of the Court directing him to take further steps, and after a refusal of the Grand Jury to indict in September, the matter was dropped. This episode confirmed Jefferson and his party in their view that the Federal Judges were determined to maintain all the old obnoxious features of the Federalist policies. As the detested Sedition Act was no longer in existence, the proceeding for libel in this case had been instituted under the common law. Since it was highly doubtful whether the article constituted criminal libel even at common law, Jefferson considered the action of the Court to be a pure usurpation. And another prominent Virginian wrote: "It would seem that the 'friends of order', being beaten out of Executive and Legislative forts, are about to man their cannon *en barbette* and play upon all the Republicans from the Gibraltar of the Judiciary Department. . . . It seems an absurdity that the Courts of the United States should have any check or control, in the least degree, over the press or the opinions of citizens or others respecting the President, Congress, Judiciary, the Constitution, or, in short, respecting any subject whatever. From the nature of the Government of the United States, it cannot stand in need of any restriction of the freedom of the press, and as, on the one hand, it cannot stand in need of these powers claimed by the Judiciary, so, on the other, they cannot be entrusted with them and be enabled thereby to extend these powers and gratify the wishes of the Legislative and Executive to whom they may look up for the rewards of their obsequiousness." [1] The Republican newspapers treated the affair as an example of Federalist partisanship, and one asked: "Can any candid men have any further doubts

[1] *National Intelligencer*, Nov. 18, 1801.

as to the object which was intended by the new Judiciary system?" Another said that "these things are not without their use as they may tend to correct the abuse of justice in the end."

Closely following this attempt of the new Judges appointed by President Adams to enforce a doctrine objectionable to the views of President Jefferson, another episode occurred in September, 1801, which again irritated Jefferson against the Judiciary. In the United States Courts in Connecticut, proceedings had been instituted for the condemnation in prize proceedings of an armed French ship, the *Schooner Peggy*, captured during the hostilities with France in April, 1800. Owing to the fact, however, that the recent treaty, negotiated with that country by Chief Justice Ellsworth and ratified in the closing days of the Adams Administration, contained a provision that captured ships not definitively condemned should be returned to their owners, Jefferson, soon after coming into office, had directed the United States Attorney, Pierpont Edwards, to cause the proceeds of the sale of the schooner, then in the custody of the Clerk of the United States Court, to be paid over to the French claimants. The Clerk had refused to comply and had asked the new Circuit Court to pass an order regarding these proceeds, whereupon (as stated in the newspapers of the day) "Mr. Edwards interposed and read to the Court the order above alluded to, which he had received from the President. Mr. Griswold, who was professionally engaged in this business, observed to the Court that the Constitution and laws had prohibited all appropriations of money by the President; he therefore did not comprehend the principle on which the order of the President was founded and strongly insisted that by law the money in question must be paid into the

treasury of the United States. The Court unanimously acceded to this doctrine and gave directions accordingly. After reading the order to the Court, Mr. Edwards passed over the subject *sub silentio*." While the action of the Circuit Court was undoubtedly correct, and while the Presidential order was utterly invalid, the refusal to recognize his authority was regarded by Jefferson as a political move on the part of Adams' Judges, especially since it became the subject of comment in the Federalist party organs who exulted over the defeat of "executive usurpation." [1] That the United States Courts, however, were determined to maintain their independence of the Executive, whether Federalist or Republican, had been made plain at the August Term of the Supreme Court in this same year at the argument of *Ship Amelia, Talbot* v. *Seaman*, 1 Cranch, 1. In this case, involving the right to salvage by an American vessel which had recaptured a neutral vessel previously captured and armed by the French, in order to prove the legality of the recapture, James A. Bayard, counsel for the claimants, had offered to read the instructions of President Adams construing the statute passed by Congress authorizing hostilities by American ships. To the reading of this paper, all the Judges were opposed, and Judge Paterson stated that he had "no objection to hearing them, but they

[1] *New York Evening Post*, Jan. 22, 1802. See also *New York Commercial Advertiser*, "To the President", No. XVIII; *Connecticut Courant*, Jan. 18, 1802, which said: "Your directing the prize money of the French Schooner *Peggy* condemned in the Circuit Court in Connecticut to be released to the claimant was held by the Court to be illegal; the Court disobeyed the order and decreed the money to be paid into the Bank of the United States for the public benefit."

In *United States* v. *Schooner Peggy*, 1 Cranch, 103, at the December Term in 1801, the Supreme Court held that Jefferson's construction of the treaty as applied to the facts in this case was correct, and that by the decree of the Circuit Court the vessel was not "definitively condemned", and that it should be returned to its French owners; see also Attorney-General Lincoln's opinion to the contrary, June 17, 25, 1802, *Ops. Attys.-Gen.*, I, 114, 119. As to this episode, see also letters of Gallatin to Madison, June 9; Madison to Pichon, July 19; Gallatin to Hamilton, Aug. 13, 1802, *Hamilton Papers MSS.*

will have no influence on my opinion. . . . We are willing to hear them as the opinion of Mr. Bayard but not as the opinion of the Executive." [1]

The third episode which confirmed Jefferson's belief that the United States Courts were determined to thwart him politically occurred at the December Term in 1801, when, ten days after the Court convened, there was presented in an original suit a petition for a rule to show cause why a writ of mandamus should not be granted to require James Madison, Secretary of State, to deliver certain commissions as justice of the peace to William Marbury of Washington, and Dennis Ramsay, Robert R. Hooe and William Harper of Alexandria. The circumstances giving rise to this famous case of *Marbury* v. *Madison* are well known. A week before Jefferson became President, the organic Act of the District of Columbia had been passed, February 27, 1801, providing for the appointment by the President of justices of the peace for the counties of Washington and Alexandria. On March 2, President Adams proceeded to appoint twenty-three for the former county and nineteen for the latter, and the Senate confirmed them all, on March 3. The commissions had been made out in the office of the Acting

[1] This was the only case (appearing in *Cranch's Reports*) decided at the August Term; it had been argued Aug. 11, 12, 13, 1800, but postponed by the Court, Aug. 14, 1800, for further argument. See 4 Dallas, 34. The newspapers very generally published the opinion of the Court in full. See *Aurora*, Aug. 21, 1801.

One other case argued at this Term (but not decided until the succeeding December Term), *Wilson* v. *Mason*, 1 Cranch, 450, was notable for the fact that one of the counsel, Joseph Hamilton Daveiss of Kentucky, was the first lawyer to appear before the Court from west of the Alleghany Mountains. "His eloquent presentation of this case won the admiration of Chief Justice Marshall and gave him a standing among the foremost lawyers." He had been appointed by President Adams as United States Attorney in December, 1800, and was removed by Jefferson in 1807. In 1803, he married Marshall's sister Ann. See *Quarterly Pub. of the Hist. and Phil. Soc. of Ohio* (1917), XII; and for an extraordinarily vivid description of his appearance in Washington in 1801, see *Bench and Bar or Digest of the Wit, Asperities and Amenities of the Bar* (1857), by L. J. Bigelow, *Harper's Weekly*, April 27, 1867.

Secretary of State (John Marshall himself), carried to the President for signature, and returned to the Acting Secretary of State who had affixed to them the seal of the United States.[1] Of these commissions, however, at least four had not been delivered when President Adams' term of office expired at midnight on March 3, 1801; and President Jefferson on coming into office at once ordered that these commissions should be withheld. "The nominations crowded in by Mr. Adams after he knew he was not appointing for himself," he wrote, "I treat as mere nullities. His best friends do not disapprove of this"; and again he denounced these "new appointments which Mr. A. crowded in with whip and spur from the 12th of Dec. when the event of the election was known . . . until 8 o'clock of the night at 12 o'clock of which he was to go out of office. This outrage on decency should not have its effect, except on the life appointments which are irrevocable."[2] While a large number of the justices chosen by Adams received reappointments from Jefferson, four of those who were not so favored determined to test his legal right to withhold their commissions,

[1] A letter from a Republican Congressman in the *Aurora*, Dec. 30, 1801, states: "The commissions had been made out in blank, and subscribed by Mr. Adams before the nominations were made to the Senate. The Senate, however, agreed to the nominations, but the third of March was not long enough to allow the commissions to be entered on record in the office of the Secretary of State or to be forwarded to the nominees."

It is a singular fact that Marshall acted as Secretary of State for President Jefferson at the latter's request. See letters of March 2, 4, 1801, *Political and Economic Doctrines of John Marshall* (1914), by John R. Oster.

[2] *Jefferson*, IX, letters in 1801 of March 23, to W. B. Giles, March 24, to W. B. Giles, March 24, to W. Findley, March 24, to Benjamin Rush, March 27, to Henry Knox, March 29, to Elbridge Gerry, March 29, to Gideon Granger. Jefferson wrote to Mrs. John Adams, June 13, 1804: "I can say with truth that one act of Mr. Adams' life, and one only, ever gave me a moment's personal displeasure. I did consider his last appointments to office as personally unkind. They were from my most ardent political enemies. . . . It seemed but common justice to leave a successor free to act by instruments of his own choice." See also especially *History of the Office of Justice of the Peace in the District of Columbia*, by Charles S. Binney, *Columbia Historical Society Records* (1902), V. Jefferson's generosity in reappointing so many of Adams' choice was praised in the *National Intelligencer*, March 23, 1801.

and accordingly instituted petitions for mandamus. The proceedings, which took place in Court on December 21, 1801, when Charles Lee (formerly Attorney-General under Adams) presented his preliminary motion for a rule to show cause, were described in lively fashion from the Republican point of view by the Washington correspondent of the *Aurora:* [1] "Mr. Lee entered very largely into a definition of the powers of the Court, and of the nature of mandamus which he described as a species of appeal to a superior for redress of wrong done by an inferior authority. The Chief Justice (J. Marshall, the *ci-devant* XYZ ambassador) asked if the Attorney-General was in Court, and had anything to offer. Mr. Lincoln (Attorney-General) replied that he had no instructions on the subject. The Secretary of State had received notice on the preceding day, but he could not in the interval have turned his attention effectually to the subject. He would leave the proceedings under the discretion of the Court. The Chief Justice, after consultation, found none of the Bench ready but Judge Chase (the same who presided and decided in Mr. Cooper's case) who said if the attorney (Mr. Lee) would explain the extent of his evidence and lay it before the Court in form, he would give his opinion instantly. Some conversa-

[1] *Aurora,* Dec. 22, 1801. A detailed account of the institution of *Marbury* v. *Madison* was published in all the leading Federalist papers, stating the facts as follows: "From the press of business which is usual at the close of every session of Congress and which a variety of causes made particularly so at the last session, the attention of the Secretary and the clerks was engaged by more important concerns, the commissions were neglected for several days and were at length abandoned to the honor and integrity of the new Administration. The appointments were in the meanwhile published in the papers. It is said that it was among the first acts of the new President to stop the issuing of all commissions from the office. We forbear making any remarks or entering more into detail, until the Supreme Court have acceded to the above motion which it is expected will be today." *New York Evening Post,* Dec. 23, 1801; *Connecticut Courant,* Jan. 4, 1802. The *Columbian Centinel,* in Boston, April 2, 1801, attacked Jefferson for his "impudence" in illegally detaining the commissions.

tion took place on the etiquette of sealing and recording commissions, and Mr. Lee said the law spoke big words and that the act of recording, under his experience of the Secretary's office, was esteemed done when a copy was delivered for entry, and that the copy remained sometimes six weeks unentered, but was still considered as recorded. The Court did not give any opinion, but Mr. Lee proposed to amend his affidavits by a statement that the great seal had been actually affixed to the commissions. The tories talk of dragging the President before the Court and impeaching him and a wonderful deal of similar nothingness. But it is easy to perceive that it is all fume which can excite no more than a judicious irritation." After one day's consideration, the Court granted this preliminary motion for a rule to show cause and assigned the fourth day of the next Term for the argument of the question whether the petitioners were entitled at law to the issue of a writ of mandamus. "The Court engaged in a curious discussion which has terminated in a decision which is considered as a bold stroke against the Executive authority of the Government," wrote a Republican Congressman to James Monroe. "It is supposed that no further proceedings will be had; but that the intention of the gentlemen is to stigmatize the Executive, and give the opposition matter for abuse and vilification. The consequences of invading the Executive in this manner are deemed here a high-handed exertion of Judiciary power. They may think that this will exalt the Judiciary character, but I believe they are mistaken." [1]

[1] *National Intelligencer*, Dec. 21, 1801; *Monroe Papers MSS*, letters of Stevens Thomson Mason, Dec. 21, 1801, and John Breckenridge, Dec. 24, 1801; *Columbian Centinel*, Nov. 28, Dec. 5, 19, 1801; *Aurora*, Nov. 20, Dec. 30, 1801. "The Tory prints begin to be alarmed about the Judiciary of John Adams' manufacture, and as usual, begin to preach up the regal doctrine of perpetuation in office. We hope shortly to see the whole system altered."

Although on December 8, 1801, two weeks before this action of the Court, Jefferson in his first message to Congress had made a mild reference to a reform of the judicial system, no final decision had been reached as to a repeal of the Circuit Court Act of 1801. It was not until the Court decided to take the preliminary step in this mandamus case that Jefferson became convinced that it was seeking to interfere with his Executive functions and that the growing pretensions of the Judiciary must be curbed. On December 24, 1801, John Breckenridge, Senator from Kentucky (who later became Jefferson's Attorney-General), wrote to Monroe: "What think you of the rule entered upon the Federal Court last week against the Secretary of State to show cause? . . . I think it the most daring attack which the annals of Federalism have yet exhibited. I wish the subject of the Courts to be brought forward in the Senate next week"; and Stevens Thomson Mason wrote to Monroe: "An attempt has been made by the Judiciary to assail the President (through the sides of Mr. Madison). . . . The conduct of the Judges on this occasion has excited a very general indignation and will secure the repeal of the Judiciary Law of the last session, about the propriety of which some of our Republican friends were hesitating." At first, there had been considerable doubt, even among Republicans, as to the legality of such a repeal, but Breckenridge was finally convinced by a letter from John Taylor of Virginia, written on December 22; and on January 6, 1802, he moved in the Senate the repeal of the obnoxious law.[1] That the Republicans regarded (and with considerable foundation for

[1] It appears, however, that before the date of Jefferson's Message, John Breckenridge had been in receipt of numerous letters from his Kentucky constituents urging repeal of the Circuit Court Acts. See *infra*, 221. *Breckenridge Papers MSS; Judicial Tenure in the United States* (1918), by William S. Carpenter.

the belief) the institution of mandamus proceedings in the *Marbury Case* as a purely political move on the part of the Federalist Party, and as an effort to scare off their opponents from attempting to repeal the Judiciary Law, is very clearly shown in a letter from a Washington correspondent, written within five days after the repeal bill was introduced.[1] "The debate has attracted considerable attention," he wrote, "but as its importance may not be seen in its true political light, I think it proper to tell you that the late mandamus business in the Supreme Court was calculated expressly with a view to deter from any attempt to repeal this law. The question on the mandamus first appeared as only a contest between the Judiciary and Executive, but it now appears to have embraced a larger scope." After pointing out that, if the Federalist contention that a law establishing a Court was irrepealable was sound, "the Judges, who have so much controul over life and property and who by the boundless construction of common law assume the most dangerous power, would then regulate not only the law but the government", and that Congress must "rescue the country," he continued: "The mandamus, then, would in the first instance act as a check, and in any case tend to throw doubts among weak men and afford at least room for invective; again, if the Court should carry the assumed right of mandamus to Executive officers into practice, the precedent would not only perpetually enable the Supreme Court to controul the Executive but to perplex the Administration by similar litigations on the repeal of the law, in which case the Court would not be at war with the Executive, but with Congress. There is reason to believe that

[1] *Salem Register*, Jan. 28, 1802, letter of Jan. 11, from a Washington correspondent.

Congress will not be deterred from its duty and that the law will be repealed. No doubt, some struggle will be made at the next sitting of the Supreme Court in this city to effect something under color of law, which may have a tendency to raise the drooping spirits of the opposition party — indeed, I am told that the matter was at first proposed by those behind the curtain not to bring it forward so soon, but the rumours that had been spread of the President's intention not to ape the monarchical forms of speechifying induced them to precipitate the business in the last Term." [1] If the purpose of the Federalists in instituting the *Marbury Case* had been such as was intimated in this letter, it utterly failed; for the Republican party had no intention of being deterred from abolishing the Federalist Judiciary legislation. For two months there ensued a prolonged and heated debate in Congress.[2] Ostensibly there were three leading points of discussion — first, the necessity for any increase in the number of Federal Judges, in view of the alleged decrease in business in the Federal Courts; second, the desirability of the performance of Circuit Court duty by the Supreme Court Judges; and third, the constitutionality of the proposed legislation. The Federalist attack was chiefly based on the proposition that a statute abolishing existing Courts would violate the constitutional pro-

[1] This reference was to the fact that President Jefferson in his First Annual Address to Congress in December, 1801, departed from the precedent set by Washington and Adams of delivering his address in person before Congress and sent in a written message through his Secretary.

[2] *7th Cong., 1st Sess.*, see debate in the Senate, Jan. 6, 8, 13, 15, Feb. 2, 3, 1802; in the House, Feb. 15, 16, 17, 18, 19, 20, 24, 25, 26, 27, March 1, 3. For detailed account of this debate, see *Marshall*, III, 50, 91, and for lively and interesting contemporary account, not cited in the above work, see letters from Washington correspondents in *United States Gazette, New York Evening Post, New York Spectator, Washington Federalist, Salem Gazette, Salem Register, passim*, Jan.–March, 1802; *Connecticut Courant*, Feb. 22, 1802; *Farmer's Weekly Museum*, March 16, 1802. See also interesting article in the *National Aegis* (Worcester, Mass.), Dec. 16, 1801, on the Judiciary system, and article quoted from *Connecticut Gazette*.

vision relative to judicial tenure of office and would destroy the independence of the Judiciary, since if Congress had the power to wipe out a Judge's position whenever it disagreed with his decision, the Judiciary would certainly become a subservient body, acting under fear of Legislative action. Under such circumstances, the Federalists said: "It will be in vain long to expect from the Judges the firmness and integrity to oppose a constitutional decision to a law." But while arguments were advanced at great length as to the merits and demerits of the existing statute and of the proposed repeal, the whole contest was, in reality, a mere desperate fight by the one party for the retention of the Federalist Circuit Judges appointed by Adams, and by the other party for their ouster. Throughout the debate, the Republicans displayed their resentment at the action of the Court in issuing its rule to show cause against a Cabinet officer. Senator Jackson of Georgia spoke of the "attack of the Judges on the Secretary of State." "The Judges have been hardy enough to send their mandatory process into the Executive Cabinet to examine its concerns. Does this in the Judges seem unambitious?" said Giles of Virginia. The granting of a rule is "an assumption of jurisdiction," said John Randolph of Virginia, and he added sarcastically: "The Judges are said to be humble, unaspiring men! Their humble pretensions extend only to a complete exemption from Legislative control; to the exercise of an inquisitorial authority over the Cabinet of the Executive. . . . In their inquisitorial capacity, the Supreme Court . . . may easily direct the Executive by mandamus in what mode it is their pleasure that he should exercise his functions." The action of the Court was defended by the Federalist leaders, James A. Bayard of Delaware and

Samuel W. Dana of Connecticut. The rule to show cause is only an incipient proceeding, said Bayard, "which concluded nothing, neither the jurisdiction nor the regularity of the Act. The Judges did their duty; they gave an honorable proof of their independence. They listened to the complaint of an individual against your President, and have shown themselves disposed to grant redress against the greatest man in the government. If a wrong has been committed and the Constitution authorizes interference, will gentlemen say that the Secretary of State, or even the President, is not subject to law? And if they violate the law, where can we apply for redress but to our Courts of Justice?" And, said Bayard further, the fact that the Court had been "hardy enough to send their mandate in to the Executive Cabinet" was strong proof of the value of the Constitutional provision making the Judges independent. "They are not terrified by the threats of Executive power and dare to judge between the rights of a citizen and the pretensions of a President." This defense, however, based as it was on an assertion of the right of the Court to grant redress against the President — a right not actually involved in the Marbury suit which only called for a mandamus to the Secretary of State — a right furthermore which the Court in its final decision disclaimed — was not calculated to calm the feelings of the President and his adherents.

The bill passed the Senate on February 3, 1802, by the close vote of sixteen to fifteen. "The Judiciary Bill keeps moving on," wrote Gouverneur Morris, a week later. "People of all parties begin to be alarmed at this wild measure, which, to get rid of a few obnoxious Judges (obnoxious to the ruling party), under the pretext of saving a little money, renders the judicial system

manifestly defective and hazards the existence of the Constitution. . . . It will, nevertheless, be carried on the triumphant vote of a great majority (many of them inwardly cursing their leaders) because the President has recommended it. . . . But I do not see how a member is to excuse himself, either to his conscience or to his constituents, for such excessive complaisance." And a Washington correspondent wrote: "The passage of the bill to destroy the Judiciary may be much obstructed but it will pass. Mr. Jefferson has set his heart upon this measure. 'Tis his favorite measure and his party will (whatever scruples some of them may feel about the constitutionality of it) make this desired offering to his revengeful spirit." Another wrote: "A band of ministerial mutes stand ready to pass it without debate. These mutes are highly drilled at the Assembly Room." [1] The bill passed the House by a party vote of fifty-nine to thirty-two, and became law on March 31, 1802. After this repeal, a further Act was passed by which the country was divided into six instead of three Circuits, to each of which was assigned definitely a separate Judge of the Supreme Court, who together with a District Court Judge should compose the Circuit Court.[2] "Judges created for political purposes, and for the worst of purposes under a republican government, for the purpose of opposing the National will, from this day cease to exist," exultingly exclaimed an Administration paper.[3]

[1] *Diary and Letters of Gouverneur Morris* (1888), II, 411 *et seq.* See as to Morris' great speech on the bill, *New York Spectator*, Jan. 23, 30, 1802; *Farmer's Weekly Museum*, Feb. 2, 15, 1802; *Connecticut Courant*, Feb. 22, 1802, letter of a Washington correspondent; *New York Evening Post*, Feb. 22, 1802.

[2] While the Act did not meet the full desires of the Judges, it was admitted, even by Chief Justice Marshall, to be a "great improvement of the pre-existing system." *United States* v. *Duvall* (1821), 6 Wheat. 542, 547.

[3] See *National Intelligencer*, March 5, 1802; *ibid.*, Feb. 5, 1802, terming the bill "the triumph of Republican principles . . . economy in the public expenditure, distrust of extravagant executive patronage, a dread of whatever tends to the

The foreboding of the Federalists over the passage of this "fatal bill" was pessimistic in the extreme.[1] "The sun of Federalism has set, indeed has fallen like Lucifer, never to rise again," said the leading Federalist organ. Another said that "by this vote the Constitution has received a wound it cannot long survive. The Jacobins exult; the Federalists mourn; our country will weep, perhaps bleed." Another stated that a mortal blow had been struck at the independence of the Judiciary, which the Constitution "intended should be a check on Executive encroachment and on Legislative intemperance and passion"; another said that it was "part of the systematic plan for the total subversion of the law itself . . . operating in its consequence a complete destruction of the independence of an integral part of the Government, and introducing a system of corruption into the sanctuary of justice"; another said that "it breaks down almost the only barrier against licentiousness and party tyranny"; another stated that the Constitution had become a "mere old woman's story . . . its evanescent authority will soon be forgotten"; another said that "the die is cast and that Constitution which Washington framed and the people adopted has become a dead letter and no better than a last year's almanac," and that the "judicial system had received its death warrant." Another stated that the President had "gratified his malice towards the Judges

unnecessary aggrandizement of the powers of the general government constitute a few of the features." *Salem Register*, Feb. 18, 1802.

[1] *Gazette of the United States*, quoted in *National Intelligencer*, Feb. 3, 17, 1802. *New England Palladium*, quoted *ibid.*, Feb. 12, 1802; *New York Spectator*, Jan. 20, 23, 27, 30, Feb. 6, 10, 13, 20, 27, 1802; *Washington Federalist*, Jan. 19, March 3, 1802; *New York Evening Post*, Dec. 17, 23, 29, 1801, Jan. 2, Feb. 22, 23, 27, March 2, 3, 19, 20, articles entitled "The Examination", dealing ably with the subject of the Judiciary. *Connecticut Courant*, Jan. 18, Feb. 15, 22, March 1, 1802, and quoting *Gazette of the United States; Farmer's Weekly Museum*, March 23, 30, 1802; *Salem Gazette*, Feb. 2, 12, 19, 26, March 2, 5, 9, 12, 16, 1802; *Salem Register*, March 11, 18, 1802.

. . . but has laid the foundation of infinite mischief", and that at the next session a move might be expected to repeal the law establishing the Supreme Court; another considered the ultimate object to be the abolition of the "ill-fated Supreme Court which Americans had fondly hoped would continue for ages the guardian of public liberty, the source of National prosperity"; another announced "the alarming destruction of the great charter of our National existence"; another termed it "the death warrant of the Constitution." Probably the most extraordinary prophecy of disaster from the passage of this legislation appeared in a letter from a Washington correspondent of the *Gazette of the United States*, who wrote: "The public mind is highly agitated here. The holders of city lots seem much alarmed. Not a lot had been sold for many days, and the prospect of a dependent Judiciary and of Judges who are to be the creatures and puppets of the Virginia party prevents the sale of landed property here. Many of the sober-minded men of Virginia are endeavoring to sell their lands and slaves and contemplate moving to New England. From the violation of the Constitution, disunion, they think, must ensue; and when it shall, they mean to be on the safe side of the boundary. . . . The men who govern in these evil times are full of vengeance. They were never the friends of the National Constitution and it will meet with no mercy at their hands." Similar exaggerated views were expressed by the leading statesmen of the Federalist party. "It is an event," wrote James A. Bayard, "which cannot be too much lamented. It establishes a principle fraught with the worst consequences under such governments as exist in the United States. The independence of the judicial power is prostrated. A Judge, instead of holding

his office for life, will hold it during the good pleasure of the dominant party. The Judges will of course become partisans and the shadow of justice will alone remain in our Courts."[1] Robert G. Harper wrote to his constituents in South Carolina: "This system received a most persevering and violent opposition from those whose main object and endeavor it is to keep the Federal Government as feeble and as dependent on the State Governments as possible. As nothing tends more to defeat this plan than to give the Federal Government a complete and well organized set of Courts where its laws may be duly enforced; so nothing promotes the plan more effectually than to keep that government destitute of such Courts, and thus lay it under the necessity of depending, in a great degree, on the State Courts for the execution of its laws. Hence, the zealous opposition to this system about the expense of which so much is said, while the real objection to it consists in its tendency to give stability and dignity to the general government and to render it independent of State influence and control." Hamilton wrote to Charles C. Pinckney that he viewed this measure as "a vital blow to the Constitution. In my opinion, it demands a systematic and persevering effort by all constitutional means to produce a revocation of the precedent and to restore the Constitution."[2] Pinckney in his reply to Hamilton said that he entirely agreed with him, but that: "It was natural to expect that persons who have been always hostile to the Constitution

[1] *James A. Bayard Papers* (1915), letter to Andrew J. Bayard, Jan. 21, 1802; *Harper Papers MSS*, letter of Feb. 25, 1801.

[2] *Hamilton*, X, letter of March 15, 1802; *Hamilton Papers MSS*, letter of Pinckney, May 3, 1802. Hamilton suggested to James A. Bayard a conference of Federalists be called in Washington, and the formation of "the Christian Constitutional Society" whose objects should be the Christian religion and the support of the Constitution; and he further said: "Let measures be adopted to bring as soon as possible the repeal of the Judiciary Law before the Supreme Court." *Ibid.*, undated letter written in April, 1802.

would, when they had power, endeavour to destroy a work whose adoption they opposed and whose execution they have constantly counteracted. But I do not imagine they will stop here; they will proceed in their mad and wicked career and the People's eyes will be opened." James Hillhouse wrote that "now the constitutional independence of the Judges is a mere cobweb." [1] Fisher Ames wrote to Rufus King: "To repeal the Judicial Law to save a small sum shocks many who could swallow the claim of a Constitutional right to repeal it. . . . Gouv. Morris' speeches are justly admired and have had effect on thinking men — *i.e.* on 600 of 6 millions"; and to Theodore Dwight, he wrote, "the angels of destruction . . . are making haste." Theodore Sedgwick wrote to King: "All men who have been misled by an attachment to refined theory, and who really wish a security of property and person, will be shocked by the establishment of a precedent which renders the Judiciary, the only instrument of this security, dependent on, and subservient to, the prevailing faction in the Legislature; and the more so when they reflect that this measure is in direct violation of the Constitution, and not only so, but establishes a principle of complete consolidation of all National and State authority. For if the Legislature may do this, there can be no established defence against legislative usurpation." Gouverneur Morris wrote that "the repeal of the Judiciary Bill battered down the great outwork of the Constitution. The Judiciary has been overthrown," and again, writing

[1] *Life and Letters of Simeon Baldwin* (1919), by Simeon E. Baldwin; letter of Hillhouse to Baldwin, Feb. 4, 1802; *King*, IV, letter of Sedgwick, Feb. 20, 1802. See *National Aegis*, June 2, 1802, to the effect that it was rumored that Rufus King was to be called home from Great Britain, that John Marshall was to succeed him as Ambassador there and that Thomas McKean, the Republican Governor of Pennsylvania, was to be made Chief Justice in Marshall's place. *Works of Fisher Ames* (1854), I, 297, letter of Ames to Dwight, April 16, 1802.

to Robert Livingston, he said: "When the Democrats got into power, I ventured to foretell that they would exalt the Executive in six months, more than the Federalists would in so many years. The facts have verified the prediction. They who have constantly cherished State sovereignty have, by their repeal of the Judiciary Law, laid the broad foundation for a consolidated government; and the first National scuffle will erect that edifice."

These exaggerated views were typical of the whole attitude of the Federalists throughout the debate on the repeal bill. The question of the advisability and the legality of abolishing the Circuit Courts had been argued with more or less restraint by the Republicans but with much violence and bitterness by their opponents, and the *National Intelligencer* was justified in commenting on this fact as follows:[1]

The decision will be a memorable one, as well from the importance of the point decided, as from the cool, dignified and enlightened deliberation by which it was reached. It will be memorable too for the style in which gentlemen on each side conducted the discussion. It was opened by Mr. Breckenridge in a speech addressed exclusively to the understanding, resting the subject upon facts and fair inference; he sunk into no needless appeal to the passions or prejudices of his hearers or the Nation. . . . Mark the contrast . . . cries of "invasion of the Constitution"; and the threat of a "dissolution of the Union" was echoed and re-echoed in every shape that ingenuity could devise or eloquence embody. . . . Thus ended this gigantic debate. With the Nation it rests to decide, if it has not already decided, the constitutionality of the right asserted by the Legislature. This decision will be made through the ordinary organs of the public will, notwithstanding the criminal efforts of party to agitate and convulse the Union. While it is to be regretted that

[1] *National Intelligencer*, Jan. 20, July 19, 1802, editorials. David Townsend wrote to William Eustis, March 4, 1802, criticizing the "impetuosity, impatience and intolerance of the Judiciary debate." *William Eustis Papers MSS.*

this untoward spirit, bent on the gratification of its sinister purposes, should put to hazard our dearest interests, by exciting passions no less subversive of Union than destructive of the great charter of our rights, we cannot feel too grateful in the assurance that the American people, whose interests are the same, will continue in every vicissitude to cling to the Union of the States as the rock of their happiness.

Subsequent history proved that the Federalist fears of the prostration of the Judiciary and the consolidation of the Government were futile. But while the Federalist attacks upon the Act and upon the intentions of its sponsors proved of little consequence, there were attacks made by some of the Republicans, during the progress of the debate, which were destined to affect very seriously the future history of the Court. For it was in this debate that for the first time since the initiation of the new Government under the Constitution there occurred a serious challenge of the power of the Judiciary to pass upon the constitutionality of Acts of Congress.[1] Hitherto, as has been pointed out, it had been the Anti-Federalists (or Republicans) who had sustained this power as a desirable curb on Congressional aggression and encroachment on the rights of the States, and they had been loud in their complaints at the failure of the Court to hold the Alien and Sedition Laws unconstitutional. Now, however, in 1802, in order to counteract the Federalist argument that the Repeal Bill was unconstitutional and would be so held by the Court, Republican Senators and Representatives from Virginia, Kentucky, Georgia, and North Carolina (and from these States alone) advanced the proposition that the Court did not possess the power.[2] "To make the

[1] *Infra*, 256 *et seq.*

[2] See speeches of Stevens Thomson Mason, John Breckenridge and James Jackson, in the Senate, Jan. 8, 13, Feb. 3, 1803; John Randolph of Virginia and Thomas

Constitution a practical system, this pretended power of the Courts to annul the laws of Congress cannot possibly exist," said Senator Breckenridge. "Let gentlemen consider well, before they insist on a power in the Judiciary which places the Legislature at their feet. . . . The Legislature have the exclusive right to interpret the Constitution in what regards the law-making power, and the Judges are bound to execute the laws they make." By thus insisting that final supremacy resided in Congress, Breckenridge now asserted the exact reverse of the doctrine maintained by him in introducing the Resolution of 1798 in the Kentucky Legislature; for then he had expressly denied that Congress was the final authority on the constitutionality of a law enacted by it. That this denial of the power of the Judiciary was an unexpected and unaccepted doctrine, now, in 1802, was very clearly shown by the fact that the Administration organ, the *National Intelligencer*, stated that it thought it important to publish Breckenridge's speech, as it presented "views in some measure new and certainly deeply interesting."[1] Its novelty was also pointed out by many speakers in the debate. Henderson of North Carolina termed it "the monstrous and unheard-of doctrine which has lately been advanced"; Hemphill of Pennsylvania said that "a doctrine new and dangerous has begun to unfold itself"; and Dayton of New Jersey spoke of "those newly professed although secretly harbored doctrines which exhibit in their true colors their deformity and dangerous tendencies." Possession of the power by the Courts was eloquently supported by Gouverneur Morris of New York, who said: "When

T. Davis of Kentucky and Robert Williams of North Carolina in the House, Feb. 16, 17, 20, 1802.

[1] *National Intelligencer*, Feb. 12, 1802; *Salem Gazette*, March 2, 1802.

you have enacted a law, when process thereon has been issued and suit brought, it becomes eventually necessary that the Judges decide on the case before them and declare what the law is. . . . The decision of the Supreme Court *is*, and of necessity *must* be, final. . . . If the Legislature may decide conclusively on the Constitution, the sovereignty of America will no longer reside in the people but in Congress, and the Constitution is whatever they choose to make it." [1] Aaron Ogden of New Jersey asked, if " the Legislature should pass bills of attainder or an unconstitutional tax, where can an oppressed citizen find protection but in a Court of Justice, firmly denying to carry into execution an unconstitutional law. What power else can protect the State sovereignties, should the other branches combine against them?" Archibald Henderson of North Carolina said it amounted to despotism if Congress were to be the sole judge of the extent and obligations of their own statutes. "If the constitutional check which the Judges were to be on the Legislature is to be completely done away and the Judge who dares to question the authority of Congress is to be hurled from his seat, then all the ramparts which the Constitution has erected around the liberties of the people are prostrated at one blow"; the concentration of legislative and judicial power in the hands of Congress was the definition of tyranny; "and wherever you find it the people are slaves, whether they call their government a monarchy, republic or democracy." Thomas Morris of New York upheld the power of Courts to decide a law not

[1] See *King*, IV, letter of Robert T. Troup to Rufus King, April 9, 1802, describing the speeches of Morris. See also *Constitutional Republicanism* (1803), by Benjamin Austin, attacking Morris' speech with great sarcasm, and for full accounts of the speech, see *New York Spectator*, Jan. 23, 30, 1802; *Farmer's Weekly Museum*, Feb. 2, 15, 1802.

"null and void, if gentlemen dislike those terms, but to be no law." John Bacon, a strong Republican from Massachusetts, said that he "must frankly acknowledge the right of judicial officers of every grade to judge for themselves of the constitutionality of every statute on which they are called to act in their respective spheres. This is not only their right but it is their indispensable duty thus to do." [1] James A. Bayard of Delaware defended the Supreme Court and its powers with great vigor in the ablest speech of the debate — a speech well worth reading in its entirety. He pointed out that "it was once thought by gentlemen who now deny the principle, that the safety of the citizen and of the States rested upon the power of the Judges to declare an unconstitutional law void. . . . Of what importance," he asked, "is it to say that Congress are prohibited from doing certain acts, if no legitimate authority exists in the country to decide whether an act done is a prohibited act?" Congress on this theory becomes "absolute and omnipotent" and may "trample the Constitution under foot. . . ." So, too, "if the States or the State Courts had a final power of annulling the acts of this government," he said, "its miserable and precarious existence would not be worth the trouble of a moment to preserve. . . . If you mean to have a Constitution, you must discover a power to which the acknowledged right is attached of pronouncing the invalidity of the acts of the Legislature which contravenes the instrument."

It has been very generally assumed by historians and jurists, writing mostly *ex cathedra*, that the opposition

[1] *National Intelligencer*, March 19, July 28, publishing in full this portion of Bacon's speech which was not reported or published in *Annals of Congress, 7th Cong., 1st Sess.* A Washington correspondent in *Salem Gazette*, March 2, 1802, said: "This concession exceedingly nettled the leaders of his party and occasioned him a severe scolding as soon as the committee rose." See also *ibid.*, March 30.

to Federal judicial supremacy which was voiced in these debates, chiefly by representatives of Virginia and Kentucky, was based on political and legal views regarding the Constitution. A review of a mass of historical material contained in an extensive correspondence between Senator Breckenridge and his Kentucky constituents shows that this assumption is probably erroneous, and that the opposition arose, not from any adherence to abstract political or juridical theories, but largely from the very concrete fear lest the decisions of the Federal Courts might be adverse to the land laws and the landholders of Virginia and Kentucky.[1] In both these States, the conditions of land titles were complicated and deplorable, and thousands of suits had been entered, largely by non-resident claimants of title. In Virginia, moreover, the famous litigation over the Lord Fairfax and other British titles vitally excited large numbers of landholders and claimants. It was, therefore, chiefly on account of these fears lest the Federal Courts should disturb existing titles that Kentuckians and Virginians seized on any weapon of attack and any available argument against the power of those Courts. This situation was clearly explained by one of Breckenridge's correspondents who wanted the Federal Courts either abolished or stringently limited in jurisdiction, and who wrote: "I apprehend great danger and mischief from the (Federal) Court in this State; a great part of the lands here are claimed by non-residents,

[1] See *History of Kentucky and the Kentuckians* (1912), by E. Polk Johnson, 143 *et seq.* "John Rowan said that the Territory of Kentucky was 'encumbered and cursed with a triple layer of claimants." See *ibid*, 141, 161 *et seq.*, for description of the excitement in 1795–96, over an early decision by State Judges as to the unconstitutionality of a Kentucky land-claimant law of 1794, and over attempts to remove the Judges for their decisions, "subversive of the plainest principles of law and justice and involving in their consequences the distress and ruin of many of our innocent and meritorious citizens." See also *History of Kentucky* (1824), by Humphrey Marshall, I, 419 *et seq.; Lawyers and Lawmakers of Kentucky* (1897), ed. by H. Levin.

numberless disputes will arise between them and our own citizens, they will bring their suits in the Federal Court even when they have but little prospect of success here, with a determination to appeal to the Supreme Court; the distance is so great, the scarcity of money and indigent circumstances of many of our citizens such that they will not be able to follow the appeal, they must either give up their lands or be forced into an ungenerous and unjust compromise." No less an eminent lawyer than Thomas Todd, then a Judge of the State Court of Appeals, and five years later destined to be appointed upon the Federal Supreme Court, wrote:[1] "The debates in the Senate on the resolution introduced by you have been highly interesting to us here as well as in other parts of the Union. . . . I really conceive the passage of that bill of immense consequence to this State in particular. The serious mischief which exists in this country is the danger of conflicting decisions on our land claims in the State and Federal Courts. This mischief, I conceive, was greatly increased by the law of Congress you are now attempting to repeal. We had better submit our causes to the decision of one Judge who is a contemporary with the law, has been almost an eye-witness to the circumstances which gave rise to a great many claims originating under it, for many years a practicing lawyer at the bar of Courts which were settling principles arising out of it, and whose principles and decisions are more in unison with the State Courts than it is possible those of the additional Judges can be. . . . I resist every idea of having suits decided by foreigners." And that the Kentuckians were adverse to all Federal Courts

[1] *Breckenridge Papers MSS*, letter of Thomas Todd to Breckenridge, Feb. 17, 1802. Harry Innes, Judge of the United States District Court for Kentucky, had written in the same strain, Dec. 27, 1801, that there was "no necessity for the Circuit Court system in the Western Country."

was shown in letters from numerous correspondents.[1] One wrote that the Federal Circuit Court system would "operate more mischievously than anywhere else, by jeopardizing those principles upon which our Courts have hitherto proceeded in settling their lands", and he hoped that "these aristocratic Judges may be left to graze in their own pastures." Another hoped that Breckenridge would "never quit the ground till the Federal Courts and the Excise Law are both laid low in the grave with old Johnny Adams." Another wrote that he would "rejoice to see the Federal Government reduced to the purposes of mere general and National concern and . . . the State Sovereignties completely reëstablished. . . . They are the true and proper guardians of our all. We can certainly so regulate them as to render any interference of the General Government almost unnecessary. Our State Courts are safe and proper tribunals for every species of controversy between man and man; and I see no reason why the General Government would not receive the same measure of justice from those Courts as from Federal Courts. This eternal clashing of Courts with concurrent jurisdiction is to me absurd and dangerous. But the greatest evil arising from the Federal plan of Courts is the awful appeal to the Supreme Federal Court." And another asked: "Are we never to get clear of a Federal Court in this State?" and said: "If nothing else can be done, pray recommend to the States to amend the Constitution. This Court will ruin this State unless we can get clear of it." That these fears had some justification was seen, twenty years later, when the Supreme Court of the United States in *Green*

[1] *Breckenridge Papers MSS*, letters of James Barbour, Feb. 22, 1802, Samuel Hopkins, Nov. 21, 1801, G. Thompson, Feb. 6, 1802, Jan. 20, 1803, John Collin, Jan. 4, 1802.

v. *Biddle* overturned the most important land-claimant laws of Kentucky on the ground of unconstitutionality.[1] While this correspondence presents such affirmative proof of the reasons for hostility to the Federal Courts, it contains also negative proof that there was no particular antagonism to the power of the Judiciary in general to pass upon the constitutionality of Acts of Congress. For, while Senator Breckenridge had attacked the existence of this power in the debates in Congress, nevertheless, not one of the mass of letters which he received from constituents congratulating him on his services in securing the repeal of the Circuit Court Act and setting forth at length the writers' views as to the defects of that Act, contained a single expression denying or even questioning the lawful existence of judicial supremacy.[2]

As soon as the Republicans passed their Act repealing the Federalist statute, they determined upon another even more radical exercise of Legislative power. Realizing that the question of its constitutionality would be at once questioned in the Courts and presented to the Supreme Court for final decision, they resolved to prevent, or at least postpone, any such decision until at least after lapse of time sufficient to strengthen the political power of the Administration. Accordingly, immediately after the enactment of the Repeal Law, a further bill was introduced, and after a short debate passed, abolishing the new June and December Terms of the Supreme Court (created by the Act of 1801), and restoring the old February Term but *not* the old August Term. By this extraordinary Legislative maneuver, an

[1] See Chapter Fifteen, *infra*.

[2] *Breckenridge Papers MSS.* For leading letters of congratulations received in 1802, see letter of William Vawter, Feb. 20, Robert Breckenridge, Feb. 19, Richard P. Barry, Feb. 21, Judge Harry Innes, Feb. 22, April 8, James Morison, Feb. 27, James Blair, March 2, Bartlet Collin, March 5, John Shore, March 14, Mathew Lyon, March 19.

adjournment of the Court was enforced for fourteen months (from December, 1801, to February, 1803). "Could a more dangerous precedent than this be established?" Bayard asked in a debate in the House: "May it not lead to the virtual abolition of a Court, the existence of which is required by the Constitution? If the functions of the Court can be extended by law for fourteen months, what time will arrest us before we arrive at ten or twenty years?" [1] There were Republican leaders also who doubted the advisability of the statute. Thus, James Monroe wrote to Jefferson that he feared that it might be construed as a sign of reluctance of the authors of the Repeal Law "to meet the Court on the subject. Any measure which admitted such an inference would give new character and tone to the Federal party and put the Republicans on the defensive. If the repeal was right, we should not shrink from the discussion in any course which the Constitution authorizes or take any step which argues a distrust of what is done or apprehension of the consequences"; and he continued with the following striking remarks as to the Court and its functions:

A postponement by law of the meeting of the Court is also liable to other objections. It may be considered as an unconstitutional oppression of the Judiciary by the Legislature, adopted to carry a preceding measure which was also unconstitutional. Suppose the Judges were to meet according to the former law, notwithstanding the postponement, and make a solemn protestation against

[1] *7th Cong., 1st Sess.*, 1229 *et seq.*, speech of James A. Bayard; *Monroe*, III, letter to Jefferson, April 25, 1802; Act of April 23, 1802.

Bayard wrote to Hamilton: "You have seen the patchwork offered to us as a new judicial system. The whole is designed to cover the object which the party considers it necessary to accomplish — the postponement of the next session of the Supreme Court to February following. They mean to give to the repealing Act its full effect before the Judges of the Supreme Court are allowed to assemble. Have you thought of the steps which our party ought to pursue on this subject?" *Hamilton Papers, MSS*, undated letter.

the repeal and this postponement, denouncing the whole proceedings as unconstitutional and the motive as impure. It might be said and truly that they had no right to meet by the law; yet, as they would claim to meet under the Constitution, to remonstrate against the law as having violated the Constitution, it is probable that that objection would not be attended to. If they attack the law, I mean the act of repeal, and are resolved to avail themselves of the occasion it furnishes to measure their strength with the other departments of government, I am of opinion that this postponement would give new colour to their pretensions, new spirits to their party and a better prospect of success. It will perhaps not be possible to avoid the collision and the crisis growing out of it. A measure of the kind referred to invites it. The best way to prevent one is to take a bold attitude and apparently invite it. The Court has a right to take its part, and ought not to be deprived of any pre-existing means. I am not apprehensive of any danger from such a collision, and am inclined to think the stronger the ground taken by the Court, especially, if it looks toward anarchy, the better the effect will be with the public. The people will then have to decide whether they will support the Court, or in other words embark again under the auspices of the Federal party, or cling to an Administration in two of the departments of the government which lessens their burdens and cherishes their liberty.

The enactment of this statute postponing the Court's session did not deflect the Federalists from their determination to have the legality of the Repeal Law presented for an adjudication by the Court, and the "Midnight Judges" themselves petitioned Congress for the passage of a resolution to request the President to cause an information in nature of a quo warranto to be filed by the Attorney-General against Richard Bassett, a petitioner, "for the purpose of deciding judicially on their claims."[1] On this resolution, a heated debate

[1] Alexander Hamilton wrote to Charles C. Pinckney, April 25, 1802: "Upon the subject of the Judiciary I have had an opportunity of learning the opinions of the Chief Justice. He considers the late repealing Act as operative in depriv-

ensued in the Senate, February 3, 1803, in which the question of the power of the Court to pass on the validity of an Act of Congress was again argued, and questioned by some of the Southern Republicans.[1] "Ought we to go to the Courts and ask them whether we have done our duty or whether we have violated the Constitution?" asked Senator Jackson of Georgia. Congressman James Ross of Pennsylvania supported the power of the Judiciary in a remarkably able and elaborate speech, in which he said: "Either the law or the Constitution is a nullity. If the new doctrines be true, the law must prevail. If so, why provide any prohibitions or exceptions in a Constitution, and why ask any solemn Judge to support it? The Court when pressed for judgment must declare which shall prevail; and if they do their duty, they will certainly say that a law at variance with the Constitution is utterly void; it is made without authority and cannot be executed. By doing so, the Courts do not control or prostrate the just authority of Congress. It is the will of the people expressed in the Constitution which controls them." Ross also pointed out the singular fact that hitherto the chief complaint of the Anti-Federalists had been that the Federalist Judges had, in the various cases coming before them under the much-attacked Alien and Sedition laws, upheld the validity of those laws. But if the Court had no power to deny their validity, with what just reason could their action in sustaining the criminal prosecutions under these laws be assailed? Hence, Ross presented to the present opponents of the Court

ing the Judges of all power derived under the Act repealed. The office still remains, which he holds to be a mere capacity, without a new appointment, to receive and exercise any new judicial powers which the Legislature may confer. It has been considered here that the most advisable course for the Circuit Courts to pursue will be, at the end of the ensueing session to adjourn generally, and to leave what remains to be done to the Supreme Court." *Hamilton Papers MSS.*

[1] *7th Cong., 2d Sess.*, 51 *et seq.*

this logical dilemma: "So general has been the impression that the Courts possess this great power, now denied, that several honorable members of this House have censured the Judges for not declaring that the Sedition Act was unconstitutional. If they had power to do so respecting that Act, why deny them the power as to other Acts?" Gouverneur Morris also pointed out that the Court had already, in the case of the invalid pensioners and in the carriage tax case, passed on the validity of Acts of Congress; and he showed that Congress itself had, in the former case, expressly submitted the question of validity to the Court. "There was a time when the American Legislature submitted their Acts to judicial decision. At that time, Washington presided. Will it be said that the Administration was then too humble?" After a long debate, the Resolution was lost by a vote of five to thirteen. In the House, a similar Resolution that "provision ought to be made by law for submitting to judicial decision" the rights of the Judges had been lost, by a vote of thirty-five to fifty-seven, after a debate on January 27, 1803. "The memorial of the Circuit Judges has been dismissed without much ceremony by those who, in feeling power, appear to forget there are such principles as right and wrong," said a leading Federalist newspaper.[1]

This refusal of Congress to take any action towards judicial determination of the rights of the Circuit Judges seemed to render it certain that through private litigation the question would be presented for the final determination of the Court. But as the case of *Marbury*

[1] *Columbian Centinel*, Feb. 16, 1803. The *American Daily Advertiser* (Phil.), Feb. 18, 1803, quoted a long editorial from the *New York Evening Post* in which it was said: "President Jefferson and the majorities in the House of Congress *dare* not submit the claim of the Circuit Judges for their compensation to judicial examination and decision."

v. *Madison* was already pending, involving an explosive political situation, the addition of a case presenting an even more heated political question was likely to render the situation of the Court highly precarious. Already talk of impeachment of some of the Judges was widespread. That the repeal of the Circuit Court Act of 1801 was not the only step which the Republicans intended to take in their campaign against the Federal Judiciary was matter of common knowledge as early as the spring of 1803, openly discussed in the newspapers and in letters of Federalist statesmen.[1] "The judicial system is the victim," wrote James A. Bayard in 1802, "on which the hearts of the whole party are set. Until it is immolated, they consider that nothing is done." And William Plumer wrote early in 1803: "The Judges of the Supreme Court must fall. They are denounced by the Executive, as well as the House. They must be removed; they are obnoxious, unyielding men, and why should they remain to awe and embarrass the Administration? Men of more flexible nerves can be found to succeed them. Our affairs seem to approach an important crisis." "The Judiciary are an offensive barrier to their views and are to be changed or set aside," wrote Stephen Higginson. "The Judges of the Supreme Court are all Federalist. They stand in the way of ruling power. Its satellites also wish to occupy the places. The Judges, therefore, are, if possible, to be removed. Their judicial opinions, if at all questionable

[1] *New England Palladium*, March 15, 1803. Timothy Pickering wrote to Richard Peters, Judge of the United States District Court in Pennsylvania, on Jan. 16, 1803, as to the probable attempt to impeach Chase and Peters for their conduct in the Fries and Cooper cases: "The object is to remove Chase to get rid of a troublesome Judge and to make room for one of the orthodox sect — no doubt of the same State with Chase — you will conjecture who this can be. This attempt cannot disturb your repose. An upright Judge has nothing to fear. He may indeed be removed from office; but his integrity the tyrants of the day cannot take away. . . . I conclude they mean seriously to attack you." *Peters Papers MSS.*

through mere errors of judgment, are interpreted into crimes and to be ground of impeachment," wrote Timothy Pickering.[1] Of the violent temper of the Court's foes, however, possibly the most significant illustration may be found in a letter (only recently come to light) from the radical Republican leader of Delaware, Caesar A. Rodney, written eight days before the decision of the Court in *Marbury* v. *Madison* and three weeks after the final denial by Congress of the prayer of the Circuit Court Judges:[2]

The Judges have made their début and have a proper congé. How strangely have they and their friends managed the business. Some fatality seems to attend every step our opponents take. The Supreme Court will proceed with caution, I should imagine, if the subject be brought before them, which I suspect will be the case. The opposition will try it perhaps in every shape of which this political Proteus is capable. They will wait, I presume, to see what length the Court dare go in the case of the justices and if *encouraged* sufficiently they will appear next on the stage. If they (*i.e.* the Judges of the Supreme Court) do assert unconstitutional powers, I confidently trust there will be wisdom and energy enough in the Legislative and Executive branches to resist their encroachments and to arraign them for the abuse of their authority at the proper tribunal. Such monstrous doctrines have been preached and such unlimited powers arrogated for them that I know not what they may possibly do. They should remember, however, that there is a boundary which they cannot pass with impunity. If they cross the Rubicon, they may repent when it will be too late to return. Judicial supremacy may be made to bow before the strong arm of Legislative author-

[1] *James A. Bayard Papers*, letter of Bayard to Bassett, Feb. 12, 1802; *William Plumer Papers MSS*, letter of Plumer to Jeremiah Mason, Jan. 14, 1803; *Pickering Papers MSS*, letter of Higginson to Pickering, Feb. 15, 1804; *Documents Relating to New England Federalism* (1877); letter of Higginson to Pickering, Feb. 11, 1804; *Life and Times of George Cabot* (1877), by Henry Cabot Lodge, letter of Pickering to Theodore Lyman, Feb. 11, 1804.

[2] *Joseph H. Nicholson Papers MSS*, letter of Rodney to Nicholson, Feb. 16, 1803.

ity. We shall discover who is master of the ship. Whether men appointed for life or the immediate representatives of the people agreeably to the Constitution are to give laws to the community. The Judges have already undertaken in "evil times" to declare war in violation of that instrument which binds us together. I sincerely hope that they may take *wit in their anger*. They are hostile to us but they do not possess enough of the old Roman to sacrifice their salaries or even to risk them in the contest. They are not sufficiently disinterested.

This was a very extreme statement to be made by a lawyer who, then a Congressman from Delaware, was destined within four years to become Attorney-General of the United States and charged with the duty of arguing the Government cases before the tribunal whose integrity he had so attacked. An even more surprising suggestion had been made regarding the Court by James Monroe, who wrote to John Breckenridge suggesting the possibility (though not prepared to indorse it) that Congress might repeal the law organizing the Court "for the express purpose of dismissing the Judges when they cease to possess public confidence", and further suggesting impeachment in case the Judges should uphold the doctrine of the Federal common law:[1]

I see with pleasure that you have moved a repeal of the late Judiciary Law and that you have supported the motion in a manner to promote the object. I am glad that you have come forward on so great a question, and trust that you will continue to do so on all those which occur while you are in service. Believe me, you have nothing to fear from any opponent, and that you have it in your power and will do essential service to your country. Too much has fallen on Virginia heretofore. The friends of the same principles should step forward in every quarter to vindicate them and thus carry them home to their constituents throughout the Union. Your argument for the repeal of

[1] *Breckenridge Papers MSS*, letter of Jan. 15, 1802.

the law is highly approved here. Do you mean to admit that the Legislature has not a right to repeal the law organizing the Supreme Court, for the express purpose of dismissing the Judges, when they cease to possess the publick confidence? The Executive may seduce them by other appointments and accommodations, but the Legislature, or in other words, the people, have no checks whatever no them, no means of counteracting that seduction but impeachment, to which it may be difficult to resort for mere political depravity. My own opinion is not made up on this point; but were it in favor of the right suggested, I would certainly not exercise it in the present case. Perhaps it ought never to be exercised. I hope, however, the period is not distant when the sovereignty of the people will be so well established, understood and respected as to make a known hatred and hostility to that sovereignty, by avowing the application of the principles of the English common law to our Constitution or any other mode calculated to undermine it, good cause of impeachment.

NOTE. It is interesting to note that as early as June 29, 1792, Jefferson wrote to Madison that Hamilton wanted Marshall in Congress, "has plyed him well with flattery and solicitation, and I think nothing better could be done than to make him a Judge."

A Washington letter in the *Gazette of the United States*, Jan. 29, 1802, said: "The President is said to have taken a vastly active part in this project for repealing the Judiciary — indeed it is regarded as his measure and deemed to be the offspring of his resentment. . . . There are strong reasons for supposing that several pieces which have been published in the *Richmond Examiner* on the subject of the repeal are from the pen of Mr. Jefferson;" see also *Independent Chronicle*, Jan. 21, 1802.

A letter from a Republican Congressman to a friend in New York, in the *Aurora*, Dec. 30, 1801, gives the contemporary view of *Marbury* v. *Madison:* "The Supreme Court of the United States, a few days ago, were engaged in a curious discussion which had terminated in a decision which is considered as a bold stroke against the Executive authority of the Government. . . . It is supposed no further proceedings will be had; but that the true intention of the gentlemen is to stigmatize the Executive and give the opposition matter for abuse and vilification. The consequences of invading the Executive in this matter are deemed here a high-handed exertion of Judiciary power. They may, perhaps, think that this will exalt the Judiciary character but I believe they are mistaken."

Judge Richard Peters wrote to Timothy Pickering, Nov. 19, 1802: "Father Cushing and Uncle Chase are on their last legs. When they go off the stage, the Supreme Tribunal which governs all things will be filled by those of the same cast of sentiment with the Executive. *Festina lente* should be his motto." *Pickering Papers MSS*, XXVIII.

CHAPTER FIVE

THE MANDAMUS CASE

1803

When the Republicans enacted their legislation in 1802 forcing a year's adjournment upon the Court, they little anticipated that its first action upon its convening thereafter would consist in the rendering of decisions in two important cases then pending, the effect of which would be to support the policies of the Republican Administration. Yet such was the surprising outcome of the February Term of 1803, when, in *Marbury* v. *Madison*, the Court denied the constitutionality of the Act of Congress under which mandamus had been issued against Cabinet officials, and in *Stuart* v. *Laird*, the Court sustained the constitutionality of the Republican Circuit Court Act of 1802.

While the main facts regarding the first of these cases, as given in the official report, are very familiar to the legal profession, a more complete study than has hitherto been made of contemporary writings portraying the details of the argument and the manner in which the decision was received throws much new light upon the actual reasons for the opposition which the decision evoked. The perspective of history is often enlightening, but it is also often misleading. The temptation is often strong to project the present aspect of a case back to the date of its decision, and thus to obtain an erroneous view of its contemporary importance. A decision gathers accretions with the passage of time, and frequently that portion of the

opinion which was of greatest import at the time when it was rendered becomes subordinate to other considerations. This is particularly true as to the decision in *Marbury* v. *Madison.* To the lawyers of today, the significance of Marshall's opinion lies in its establishment of the power of the Court to adjudicate the validity of an Act of Congress — the fundamental decision in the American system of constitutional law. To the public of 1803, on the other hand, the case represented the determination of Marshall and his Associates to interfere with the authority of the Executive, and it derived its chief importance then from that aspect.

Contemporary writings make it very clear that the Republicans attacked the decision, not so much because it sustained the power of the Court to determine the validity of Congressional legislation, as because it enounced the doctrine that the Court might issue mandamus to a Cabinet official who was acting by direction of the President. In other words, Jefferson's antagonism to Marshall and the Court at that time was due more to his resentment at the alleged invasion of his Executive prerogative than to any so-called "judicial usurpation" of the field of Congressional authority. This phase of the *Marbury Case* was brought out vividly in a debate which took place in Congress, a few days before the opening of the February, 1803, Term, over a motion made by Federalist supporters of Marbury that the Secretary of the Senate furnish from its Executive Records a transcript of the dates of the nominations of justices of the peace by President Adams and of the actions of the Senate thereon. This evidence was of course desired in support of the petition for issue of the writ of mandamus which was to be argued at the coming Term. Opposing this motion, Wright of Maryland said

that the Senate was being called upon "to aid in an audacious attempt to pry into Executive secrets by a tribunal which had no authority to do any such thing, and to enable the Supreme Court to assume an unheard of and unbounded power, if not despotism. It is to enable the Judiciary to exercise an authority over the President which he can never consent to. It is well known that the persons applying are enemies to the President, and that the Court are not friendly to him. . . . No Court on earth can control the Legislature, and yet it has been held here on the floor that they can, and this is a part of the same attempt to set the Court above the President and to cast a stigma upon him." Jackson of Georgia hoped that the Senate "will not interfere in it and become a party to an accusation which may end in an impeachment, of which the Senate were the constitutional Judges." Breckenridge of Kentucky repeated the arguments which he had made the previous spring. "The Senate should not countenance," he said, "the Judiciary in their attack on the Executive power which is not constitutionally amenable to the Judges. . . . It is dangerous to countenance the pretensions set up by the Judges to examine into the conduct of the other branches of the Government; for if they have a right to examine, they must have, as a necessary incident, the right to control the other departments of Government. Such right is inconsistent with every idea of good government, and must necessarily degrade those branches which the Judiciary should thus undertake to direct. The present suit is therefore levelled at the dignity of the first Executive Magistrate, and the Senate is bound to protect that dignity." [1] Jefferson's friends succeeded in causing the

[1] See especially *Aurora*, Feb. 2, 4, 1803; *National Intelligencer*, Feb. 2, 1803; *Salem Register* (Mass.), Feb. 21, 1803. It has been a source of wonder to many

defeat of the motion and Marbury was thus obliged to secure his evidence in some other fashion. An editorial in the *National Intelligencer* of February 2, 1803, gives a lively picture of the Jeffersonian point of view : [1]

When Mr. Jefferson entered upon the duties of the Presidency, he found himself under the necessity, during the recess of the Senate, of making new appointments, or of being instrumental in the giving effect to an exercise of power by his predecessor, which, if it did not violate the letter, certainly did violate the spirit and the end of the Constitution. Between these alternatives, he could make no other choice than the adoption of the former course. For the sake of harmony, he appointed the greater part of the gentlemen nominated by Mr. Adams, notwithstanding their *federal politics*. Those whom he neglected to appoint, fired with party vengeance, immediately made application to the Supreme Court (that *paramount* tribunal!) to issue a mandamus to the Secretary of State to deliver to them their commissions. The Supreme Court ought to have refused any instrumentality into this meditated, and, we may add, party invasion of Executive functions. But they so far sustained it as to allow a rule to show cause why a mandamus should not issue. Contemplating a decision on this point, the aforesaid individuals some days since addressed a memorial to the Senate of the United States, requesting permission to obtain . . . a transcript of the proceedings on their nomination by Mr. Adams. This memorial was

why these justices of the peace, whose terms of office were only for five years, were so insistent in pressing their case. A letter from Francis Peyton of Alexandria, in *Breckenridge Papers MSS*, April 4, 1802, possibly gives the explanation; he complains strongly of the statute which made these Justices members of the Levy Courts of the Counties, and entitled to such Court fees "by which they may meet as often as they think proper and may demand from the county two dollars for each day they attend; they are compelled to sit twenty days and hear and determine appeals from the returns of the assessors."

[1] See savage attack on this article in *Washington Federalist*, Feb. 4, 1803. This paper was extremely virulent in its politics; and it was stated by the *National Intelligencer*, Jan. 2, 1804, to be edited by Elias B. Caldwell, the Clerk of the Supreme Court of the United States. The *Aurora*, May 16, 1803, also charged that it was under the patronage of Chief Justice Marshall. To this, the *Washington Federalist* replied, May 25, 1803, that it would be gratified if it were under the patronage "of that great, amiable and worthy man" but "we enjoy from him no other patronage than that afforded us by every punctual subscriber."

taken up on Monday and rejected Yes 15 — Noes 12 — on the ground that the measure was a party measure; that it was meant as the basis of Executive crimination; that it claimed an act from the Senate who were great constitutional Judges of the Executive in case of impeachment, that might indelicately and improperly commit them; that it sanctioned a right of the Judiciary to which they had no legal pretensions; and that it totally abrogated that rule of the Senate which injoined that the Executive Journal should be kept secret. It would seem from the recent attempts to disturb the harmony of the Legislature, that as much effect is calculated upon from the *ghost* of judicial power, as from the reality of it. On the annihilation of the latter, the former appears to have risen from the tomb of Capulets, and to have stalked into either house, alternately crying "Vengeance, vengeance" — "Money, money."

The opening of the Term of Court at which the noted *Marbury Case* was to be heard was referred to in the newspapers as follows: "It is expected that business of much importance will come before the Supreme Court of the United States now sitting at Washington. The constitutionality of the anti-justices bill, the affair of Mr. Marbury and others who were deprived of their commissions as justices of the peace by Mr. Jefferson, and several important civil cases of an individual kind. We are informed that most of the gentlemen of the Bar of this city will attend here." [1] On February 9, 1803, the rule to show cause came on for hearing before the Court; and Marbury's counsel, Charles Lee, was confronted at the outset with obstacles in proving the facts of his case, owing to the unwillingness of the Secretary of State and of his subordinates to give any information whatever

[1] Poulson's *American Daily Advertiser* (Phil.), Feb. 15, 1803, quoting *Baltimore Anti-Democrat.* The Court met on Monday, February 7, but only four Judges were present, Judge Cushing being ill. *Washington Federalist,* Feb. 9, 1803.

as to the commissions. It appeared from affidavits that Madison had refused to answer Marbury's inquiry whether his commission was signed and sealed; and when demand was made for the delivery of the commission, Madison had referred to the Chief Clerk Wagner, who answered that the commissions were not then in the office, but had been delivered to Attorney-General Lincoln. At the hearing in Court, Wagner and another clerk declined to respond to questions, on the ground that they ought not to disclose official information, but the Court ordered them to be sworn and their answers taken down in writing. The Attorney-General who was summoned as a witness also objected to testifying, and asked that the questions be put in writing so that he might have time to determine whether he would answer them, since, as he said, he felt himself delicately situated between his duty to the Court and the duty he owed an Executive department. To this plea, the Court replied "that if Mr. Lincoln wished time to consider what answers he should make, they would give him time, but they had no doubt he ought to answer." This singular episode was vividly described in the newspapers as follows: "Mr. Lincoln submitted . . . that if the Court should think it proper the questions might be committed to writing and time allowed him to weigh the obligations between which he was placed; his duty to the government through the office of State, and his duty to the Court and the laws. Should there any militancy arise between the two duties, it required some consideration before he should decide between the difficulties. That if the Court should, upon the question being submitted in writing, determine that he was bound to answer them, another difficulty would suggest itself upon the principles

of evidence; he would suppose the case to assume its most serious form, if in the course of his official duty these commissions should have come into his hands, and that he might either by error or by intention have done wrong, it would not be expected that he should give evidence to criminate himself. This was an extreme case, and he used it only to impress upon the Court the nature of the principle in the strongest terms. Four questions were presented by Mr. Charles Lee, counsel for Marbury, etc., and being submitted to Mr. Lincoln, he solicited of the Court, their decision. Judge Washington gave his opinion first (as youngest Judge) in favor of the questions and their pertinence. Judge Chase gave his opinion in the same way, and Chief Justice Marshall concurred (Judges Paterson and Cushing were not present). Mr. Lincoln asked till the next morning to determine as he was compelled to attend the present day on the committee on the Georgia claims." [1] When Lincoln went on the stand, the next day, he stated in answer to the questions that he had seen some commissions signed and sealed, but did not recollect whether they were those of Marbury and of the other petitioners. As to the disposition which had been made of the commissions, the Court relieved him from testifying (and it is a singular fact that to this day no one knows what became of them).[2] The reluctance of the Attorney-

[1] This report of the case in the *Aurora*, Feb. 15, 1803, is much fuller than that which appears in *Cranch's Reports*, though the latter is taken *verbatim* from the report as published in the Anti-Federalist newspaper, the *National Intelligencer*, March 18, 21, 25, 1802. The *National Aegis*, published in Worcester, Mass., an Administration organ, said, March 2, 1803: "The Attorney General has appeared in the Supreme Court and consented to be examined as a witness in the business of the mandamus. He has declined appearing in behalf of the Secretary of State, having no instructions for that purpose."

[2] A letter from a Republican Congressman in the *Aurora*, Dec. 30, 1801, stated: "There they lay on the table when the present Administration commenced; and nothing more has been heard of them. It is supposed they were disposed of with the other waste paper and rubbish of the office."

General to state the facts was caustically commented upon by the Federalist papers, one of which termed him "a blacksmith, then a County Court lawyer, and now the first law officer in the Union, the elegant writer of the pieces commonly called 'The Worcester Farmer'; who made the discovery that it was high treason for a clergyman to think of politics, and what is more extraordinary that it amounted to the horrid crime of 'oppugnation', if he mentioned President Jefferson's name without first, in token of reverence, pulling his hat and wig off — this great man was cited before the Supreme Court, a few days since, as a witness, and being sworn in the usual manner was asked a simple question, but could not answer it till they gave it to him in writing, and he went off and spent a whole day and night with it, and with closed doors; and then he made out to remember that he had forgotten all about it." [1] Finally, the existence of some of the commissions was proved by affidavits of a clerk in the State Department and of James Marshall. In view of the fact that the Chief Justice had been Secretary of State at the time when these commissions were prepared and knew personally everything which Lee was painfully trying to prove, it is difficult to see why Jefferson and Madison were so insistent in refusing to admit the facts; and the question put by Dana in Congress seemed to be somewhat justified:

[1] *Washington Federalist*, Feb. 23, 1803. The *Aurora*, March 22, 1803, said that James Marshall, a brother of the Chief Justice, went to the office of the Secretary of State, on the 4th of March, to inquire if the commissions were completed, so that some magistrate might be found to preserve the peace in Alexandria, where riotous proceedings were expected on that night. Twelve commissions were given him, but finding that he could not conveniently carry them, he returned some. See also, 1 Cranch, 146. In *Marshall*, III, 124, a letter of John Marshall is quoted, written to his brother, March 18, 1801, in which he stated: "I should, however, have sent out the commissions which had been signed and sealed, but for the extreme hurry of the time and the absence of Mr. Wagner who had been called on by the President to act as his private Secretary."

"Why was there this shunning and changing from one to another; why all this dodging; why all this consultation; why give all this trouble about ascertaining facts, if they are doing right?"

On February 11, 1803, Lee began his argument, speaking (as the newspapers said) "at considerable length. The Attorney-General said that he had received no instructions to appear. The Court, when Mr. Lee terminated his argument, observed that they would attend to the observations of any person who was disposed to offer his sentiments." No one responded, however, to this invitation. At the time of this argument, it received little attention; for the city of Washington and the whole country were greatly excited over the alarming crisis in the relations with France and Spain. Four months before, the action of a Spanish official in withdrawing the right of deposit of goods for export at New Orleans, which had theretofore been granted to American citizens, had inflamed the whole of the Western country; and by the month of February, it was reported that Kentucky and Tennessee were on the verge of attempting a seizure of New Orleans by armed force. Jefferson had hastily dispatched James Monroe to France, with instructions to purchase sufficient territory on the Mississippi to secure American rights. The Federalists, however, had not been satisfied with attempts to settle the difficulty by negotiation; they sought to make political capital out of the issue, to interfere with Jefferson's peace policies and to undermine his efforts in France, by inflaming the minds of the people of the United States and especially of Kentucky, to demand settlement through a war. Just at the time when the *Marbury Case* involving encroachment on Executive functions was argued, a much more dangerous encroachment

on the rights of the President had been launched in the Senate by the Federalist Senator from Pennsylvania, James Ross; and it was this move which, in February, 1803, was engaging the attention of Jefferson and the Democrats, much more than the somewhat moot question involved in the case in the Court. On February 14, at the end of the Marbury argument, Senator Ross had introduced resolutions providing that the President be authorized to take immediate possession of New Orleans and to call into service 50,000 State militia and to employ them with the military and naval forces of the United States, in effecting the above objects.[1] This resolution was a direct and serious interference with the President's peace negotiations and was so intended. It met with strong and bitter Republican opposition. "It is in fact a proposition to exercise the functions of the President," said Senator Wells of Delaware. "Much has been said about confidence in the Executive," said Senator Nicholas of Virginia. "There is another way in which these gentlemen may manifest their confidence in the President, and which the public good requires of them. It is, that they acquiesce in the effort that he is making to obtain our rights and security for these rights by negotiation, and thereby aid its chance of success." The Federalist Senator from New York, Gouverneur Morris, on the other hand, denied that they were "opposing obstacles or raising difficulties or fettering and trammeling Executive authority." Jefferson, nevertheless, insisted that he must not be thus interfered with and the Ross Resolution failed to pass. Before its defeat, however, the case of *Marbury* v. *Madison* was decided, and the question of Executive functions was thus before the public in two aspects.

[1] *7th Cong., 2d Sess.*, debate on Feb. 14, 16, 25, 1803.

On February 24, 1803, less than two weeks after the arguments had closed, Chief Justice Marshall handed down his famous decision. As stated in the newspaper accounts of the day, the questions considered by the Court were: "1st. Has the applicant a right to the commission he demands? 2d. If he has a right and that right has been violated, do the laws of his country afford him a remedy? 3d. If they do afford him a remedy, is it by a mandamus issuing from this Court?"[1] Taking up these points in the order in which they were thus propounded, Marshall gave an opinion on all three. Marbury's commission having been signed and sealed, said the Chief Justice, the appointment was not revocable but vested in him legal rights which were protected by the laws of the country. Delivery or acceptance of the commission was not necessary. "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." Where a head of a department acted merely as the political or confidential agent of the Executive, in a case where the Executive possessed a constitutional or legal discretion, the Courts might not control him; but where a specific duty was imposed by law, he was "amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others." In such cases, he might be subject to mandamus. At this point, the Chief Justice took cognizance of the attack which had been launched at the Court in Congress. "Impressions are often received," he said, "without much reflection or examination, and it is not wonder-

[1] *National Intelligencer*, Feb. 12, 23, 1803; *American Daily Advertiser* (Phil.), Feb. 25, 1803.

ful that in such a case as this the assertion, by an individual, of his legal claims in a Court of Justice, to which claims it is the duty of that Court to attend, should at first view be considered by some, as an attempt to intrude into the Cabinet, and to intermeddle with the prerogatives of the Executive. It is scarcely necessary for the Court to disclaim all pretensions to such jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the Court is, solely, to decide on the rights of individuals, not to enquire how the Executive, or Executive officers, perform duties in which they have a discretion." After giving thorough consideration to the question whether the case might be a proper one for mandamus, and having arrived at the conclusion that the petitioner possessed rights which he was entitled to have protected by such form of legal process, the Chief Justice took up the crucial question in the case: was there any statute authorizing the Court in the exercise of original jurisdiction to issue writ of mandamus, and if so, was such a statute valid? Clearly, if there was no such valid statute, the Court had no jurisdiction. It seems plain, at the present time, that it would have been possible for Marshall, if he had been so inclined, to have construed the language of the section of the Judiciary Act which authorized writs of mandamus, in such a manner as to have enabled him to escape the necessity of declaring the section unconstitutional. The section was, at most, broadly drawn, and was not necessarily to be interpreted as conferring original jurisdiction on the Court.[1] If, however, it was to be so construed, as the Court

[1] *The Supreme Court-Usurper or Grantee*, by Charles A. Beard, *Pol. Sci. Qu.* (1912), XXVII. The section authorized the Supreme Court "to issue writs of mandamus in cases warranted by the principles and usages of law, to any Courts appointed, or persons holding office, under the authority of the United States."

decided, then unquestionably it became the duty of the Court to pass upon its constitutionality. Marshall naturally felt that in view of the recent attacks on judicial power it was important to have the great principle firmly established, and undoubtedly he welcomed the opportunity of fixing the precedent in a case in which his action would necessitate a decision in favor of his political opponents. Accordingly, after reviewing the provisions of the Constitution as to the original jurisdiction of the Court, he held that there was no authority in Congress to add to that original jurisdiction, that the statute was consequently invalid, and that it was the duty of the Court so to declare. In comprehensive and forceful terms, which for over one hundred years have never been successfully controverted, he proceeded to lay down the great principles of the supremacy of the Constitution over statute law, and of the duty and power of the Judiciary to act as the arbiter in case of any conflict between the two. "This principle," as has been well said, "is wholly and exclusively American. It is America's original contribution to the science of law. The assertion of it, under the conditions . . . was the deed of a great man." [1]

Had Marshall's opinion in this case been confined exclusively to a determination of the validity of the

[1] *Marshall*, III, 142. William Trickett in *Marbury* v. *Madison, Critique, Amer. Law Rev.* (1919), LIII, says that it gave Marshall "an opportunity to administer a lecture" to Jefferson. Edward S. Corwin in *The Doctrine of Judicial Review* (1914), 9, and *Mich. Law Rev.* (1911, 1914), X, XII, says: "Regarded as a judicial decision, the decision of *Marbury* v. *Madison* must be considered as most extraordinary, but regarded as a political pamphlet designed to irritate an enemy to the very limit of endurance, it must be considered a huge success." And again he says: "To speak quite frankly, this decision bears many of the earmarks of a deliberate partisan coup. The Court was bent on reading the President a lecture on his legal and moral duty to recent Federalist appointees to judicial office . . . but at the same time hesitated to invite a snub, by actually asserting jurisdiction of the matter." Nothing in Marshall's character, however, justifies such imputation of low-minded and unjudicial motives, and the criticism seems too severe.

statute and to a declaration of the power to make such determination, it is probable that, in view of the final result of the decision adverse to the petitioning justices of the peace, there would have been little excitement or antagonism aroused. But Marshall had not been content with so confining the scope of his opinion. He had discussed at great length and expressed the views of the Court, as to the right of the applicants to their commissions and as to the propriety of granting a mandamus in such a case against a Cabinet officer. Such discussion was undoubtedly mere *dicta;* and it was this aspect of the case which at once aroused severe criticism and attack by President Jefferson and his adherents. With much justice and reason, they bitterly resented the action of Marshall and the Court in this respect. Jefferson felt that they had intentionally gone out of their way to rule on points unnecessarily for the decision, and he regarded it as a deliberate assumption of a right to interfere with his Executive functions, "an attempt in subversion of the independence of the Executive and Senate within their peculiar departments." "I found the commissions on the table of the Department of State, on my entrance into office, and I forbade their delivery," he said. "Whatever is in the Executive offices is certainly deemed to be in the hands of the President, and in this case, was actually in my hands, because when I countermanded them, there was as yet no Secretary of State"; and his indignation over Marshall's opinion continued hot up to the day of his death. Writing four years later, at the time of the Burr trial, he stated that he had "long wished for a proper occasion to have the gratuitous opinion in *Marbury* v. *Madison* brought before the public and denounced as not law", and as late as 1823, he wrote to Judge William Johnson that "the practice of

Judge Marshall in travelling out of his case to prescribe what the law would be in a moot case not before the Court" was "very irregular and very censurable", and that in the *Marbury Case* "the Court determined at once that, being an original process, they had no cognizance of it; and therefore, the question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case, to wit: that they should command the delivery. The object was clearly to instruct any other Court having the jurisdiction what they should do if Marbury should apply to them. Besides the impropriety of this gratuitous interference, could anything exceed the perversion of the law? . . . Yet this case of *Marbury* v. *Madison* is continually cited by Bench and Bar as if it were settled law, without any animadversion on its being merely an *obiter* dissertation of the Chief Justice." [1]

It was this phase of the case, the alleged trespass of the Judges on the Presidential field of power, which elicited the most attention from the newspapers at the time the decision was rendered, and it received widespread comment. The brief résumé of the opinion which appeared in the *National Intelligencer* was widely republished, and many papers printed the opinion in full.[2] The Federalist papers regarded it as a just rebuke

[1] *Jefferson*, X, XII, letters of Jefferson to George Hay, June 2, 1807, to William Johnson, June 12, 1823, to William Jarvis, Sept. 28, 1820.

[2] See *National Intelligencer*, Feb. 23, 1803; *Independent Chronicle* (Boston), March 4, 1803; *New York Daily Advertiser*, March 7, 1803; *American Daily Advertiser* (Phil.), March 4, 1803; *New York Spectator*, March 5, 1803; *Massachusetts Spy*, March 16, 1803; *National Aegis*, March 16, 1803. Many newspapers contained a very erroneous account of the point decided; thus the *Alexandria Advertiser* (Va.), said: "We understand the Judges of the Supreme Court have given it as their opinion in the case of the mandamus that the Justices are entitled to their commissions but that they have not the power to issue a mandamus in the District of Columbia, it not being a State; if, however, the occurrence had taken place in one of the States, they should have had no hesitation in granting it." Quoted in *Georgia Republican*, March 7, 1803, and *Boston Gazette*, March 10, 1803.

Beveridge says that the opinion "received scant notice at the time of its delivery. The newspapers had little to say about it. Even the bench and the bar of the coun-

to the President and a condemnation of his unlawful action. The Republican press termed it an abuse of power on the part of the Judges and an interference with the functions of the Executive.[1] The *Washington Federalist* said that the Court had "considered each point at great length and with great ability", and it termed the opinion "interesting and highly important", saying that it would not fail to attract attention and admiration:

> The important principles resulting from the peculiar structure of our government which are there examined and settled — the ability with which these principles are investigated — the strength and reason with which they are supported, and the perspicuous yet nervous stile in which they are delivered, must excite in every American, an honest pride, at seeing their Courts of Judicature, these guardians of their property, lives and reputations, supplied with such talents and animated with so laudable a zeal for the rights and liberties of the citizen. There has not been wanting men even on the floor of Congress, base enough to make the most unwarranted insinuations against the Justices of the Supreme Court. They have called this application for a mandamus, *their* measure — instigated and supported by them as an hostile attack upon the Executive, to gratify party spirit, and encrease their own power. Let such men read this opinion and blush, if the power of blushing still remains with them. It will remain as a monument of the wisdom, impartiality and independence of the Supreme Court, long after the names of its petty revilers shall have sunk into oblivion.

Another violently Federalist paper, the *Connecticut Courant*, printed an ironical letter in which it was said:

try, at least in the sections remote from Washington, appear not to have heard of it." *Marshall*, III, 153. This statement as to the newspapers does not appear to be supported by the facts. The decision was printed in full in *National Intelligencer*, March 16, 26, 1803; *New York Spectator*, March 30, April 2, 1803; *Aurora*, March 23, 24, 1804, and in many other papers in the country.

[1] *Washington Federalist*, Feb. 25, 1803; *Connecticut Courant*, May 25, 1803; *New England Palladium* (Boston), April 12, 1803; *New York Evening Post*, March 23, 1803; *Boston Gazette*, March 24, 1803.

Rejoice, ye democrats, at the firmness of your chieftain who dares withhold from the Justices of Columbia their commissions in violation, as the Court declared, of their vested rights, for were they not guilty of the sin of federalism, and were they not commissioned by Mr. Adams, just before he went out of office? Is it not plain that appointments by Mr. Adams and his federal Senate were an insolent offence to the dignity and feelings of Mr. Jefferson, and therefore void? It must be so . . . . Rejoice, ye democrats, that at length there is discovered such clear and irrefragable proof that the Judiciary system ought to have been broken down, the Constitution notwithstanding, for this was established just as the sun of federalism was setting, and always was very offensive to the weak nerves of Mr. Jefferson; but supposing it should be, as federalists affirm, no better than robbing to deprive men of their commissions to which they have the same right as to their houses, what of that? The public can be in no danger from such transactions, if Mr. Jefferson is the author of them!

The *New England Palladium* said:

The measures of the administration have been levelled at those passions which democracy first inflames, to use as the instruments of tyranny afterwards. But the people of New England are not so easily duped or so shortsighted as the Virginia politicians expected. In the repeal of the Judiciary, in withholding the commissions of Ray, Green and William Marbury, they estimate the value of profession of regard to the Constitution. In the last case, it has been solemnly decided in the Supreme Court that Mr. Jefferson, the idol of democracy, the friend of the people, has trampled upon the charter of their liberties.

The *New York Evening Post* published an editorial headed "Constitution violated by the President":

In this evening's papers our readers will see that it has been solemnly determined by the Supreme Court of the United States, and the opinion has been formally delivered by the Chief Justice, that Mr. Jefferson by withholding the commission from Mr. Marbury, after it was signed by

a former President and sealed by the Secretary of State has been guilty of an "act not warranted by law but violative of a vested right." And this, fellow citizens, is that meek and humble man who has no desire for power! This is he, of whom his sycophants at Washington in an address to the people, after the rising of the last Congress, said: "At the head presides a man who for the promotion of the public good and the preservation of civil liberty, solicits the limitation of his own powers, the reduction of his own privileges, and the exercise of constitutional check to limit the executive will." What falsehood! What mockery! What insolence! . . . Behold a subtle and smooth-faced hypocrisy concealing an ambition the most criminal, the most enormous, the most unprincipled. He solicits the limitation of his rightful powers, yet the first act of his Administration is to stretch his powers beyond their limits, and from motives the most unworthy, to commit an act of direct violence on the most sacred right of private property.

While the Federalist commendation of Marshall's opinion was profuse, it is surprising to note that the most bitterly partisan Republican papers, like the Administration organs, the *National Aegis* in Massachusetts and the *National Intelligencer*, and the violent opponents of Federalism like the *Aurora* in Philadelphia and the *American Citizen* in New York, made no criticism of the decision; and contrary to the views advanced by opponents of the Court in later days, these Republican papers showed no antagonism whatever to Marshall's view of the right of the Court to pass upon the constitutionality of an Act of Congress.[1] The *Independent Chronicle*, which was the leading Republican paper of Boston, published an editorial, shortly before it received word of the decision, assailing the Court, but only on the ground that the Court

[1] The *Aurora*, March 31, 1803, criticized editorially the "frequent abuse of power by Judges in the courts and justices of the peace", but it was referring to actions of the Pennsylvania Judiciary.

by issuing a mandamus would be interfering with the functions of the Executive:[1]

> The efforts of Federalism to exalt the Judiciary over the Executive and Legislative, and to give that favorite department a political character and influence, may operate for a time to come, as it has already, to the promotion of one party and the depression of the other, but it will probably terminate in the degradation and disgrace of the Judiciary. Politics are more improper and dangerous in a Court of Justice, if possible, than in the pulpit. Political charges, prosecutions, and similar modes of official influence ought never to have been resorted to by any party. The fountains of justice should be unpolluted by party passions and prejudices. The attempt of the Supreme Court of the United States by a mandamus to control the Executive functions is a new experiment. It seems to be no less than a commencement of war between the constituted departments. The Court must be defeated and retreat from the attack; or march on until they incur impeachment and removal from office. But our Republican frame of Government is so firm and solid that there is reason to hope it will remain unshaken by the assaults of opposition and the conflicts of interfering departments.

The ablest newspaper criticism of the decision appeared in a series of six letters over the signature of "Littleton" addressed to the Chief Justice and published in a Republican paper, the *Virginia Argus;* yet even in these, the assault upon Marshall's opinion was directed, not at the Court's exercise of the power to question the validity of the statute, but at the Court's irregularity in going out of its way to declare the rights of Marbury to his commission and to a mandamus after it had decided that it had no jurisdiction of the case.[2] The writer first denounced the opinion as a

[1] Beveridge points out that this editorial must have been published prior to receipt in Boston of notice of the decision.

[2] Republished in the *Aurora*, April 23, 26, 30, May 2, 3, 1803; *Republican Watchtower* (N. Y.), May 19, 25, 1803.

surprising production unworthy of its author: "The case, as it has been ushered before the world, perplexes as much as it astonishes the thinking mind. The mass of the American people receive it as the genuine production of the Court, but there is a portion of the Nation (in which the most enlightened of the profession stand conspicuous) whose credulity cannot be so easily imposed on. To the Supreme Court, as to a luminary, the community looked for light and lustre. The splendid talents of the members, their pride, their importance, their rank in office, all conspired in the impression of their rank in office, all conspired in the impression of their greatness. But in what is portrayed to be their issue, your brethren of the Bar see a hideous monster; its conceptions in giant size, its succeeding years dwindling into nothing; its head in the rear, its tail in front, its legs mounted on high to support the burthen, while its back was destined to tread the earth, its bowels in the exterior and its hide in the interior. . . . My object is first to convince you that, for one short moment, you should descend from the altitude of reserve to rescue your fame from the hungry jaws of obloquy, by disowning the child of which you are the chief putative parent; and if I fail in that, to convince the people that it is unworthy of you and therefore not yours." He then pointed out that "three questions are reported to have been decided. The last decision was that the Court had no jurisdiction to decide the other two, which they nevertheless decided. . . . To decide upon the merits of a cause without jurisdiction to entertain it, I affirm to be contrary to all law, precedent and principle," and he asked: "Could it accord with impartiality, policy, justice or dignity to reverse the principle, and encourage a litigation by prejudging a member of the Government

on a question that the very act of adjudication advised the applicant to bring before you in your appellate character?" Moreover, he complained: "The papers have not been content with exhibiting this anomaly in judicial acts — they have pencilled you, sir, in darkest colors. They make you say that a legal investigation of the acts of one of the heads of departments was rendered peculiarly irksome as well as delicate. In other words, that in solemnly committing yourselves to the applicants — in delivering an extra-judicial opinion, upon an ex-parte hearing — stirring up litigation and prejudging a great officer's conduct, whose future examination before you was thereby rendered morally certain, you were performing a duty which you submitted to with pain." This furnished, he said, an additional reason why the Court should not have passed upon points unnecessary for the decision of the case. It was evident, he said further, that Marshall was endeavoring to show to the petitioner that while he might have no remedy in the Supreme Court, he possessed one in some other Court.[1] The leading Republican paper in New England, the *Independent Chronicle*, published but one criticism of the decision, a letter from a correspondent addressed to Judge Cushing and complaining that the Court's remarks as to the right to mandamus were unnecessary: "The Court solemnly decided that they had no constitutional jurisdiction; and yet as solemnly undertook to give a formal opinion upon the merits of the

[1] These letters were attacked editorially by the *Washington Federalist*, May 18, 1805, as follows: "A writer in the *Virginia Argus* has addressed a number of essays to Chief Justice Marshall. It is amusing to see how he raves and rants in all the majesty of fancied importance. Reader, did you never see a whippet bark at the prancing steed and assume the airs of a dangerous enemy? Meanwhile, the horse disdains even to look at him. Or did you ever see a goose attack with hisses the passing herd? With what complacency it returns to receive the congratulations of its companions?"

question which was not officially before them, and that without a hearing of the adverse party and in opposition to the Executive department of government. . . . I take it for granted that the Supreme Court of the Nation would not, from party motives, volunteer an extra-judicial opinion for the sake of criminating a rival department of government; and yet, in all my reading, I have not been able to find either principle or precedent for such a practice." [1] While other Republican papers contained similar criticisms of the Court, either for deciding a point not before it or for interfering with Executive functions, practically the only published attack on that portion of Marshall's opinion which asserted the power and the duty of the Court to pass upon the validity of the Act of Congress involved was contained in a series of letters from a Virginian, signed "An Unlearned Layman" and printed in the leading Federalist paper in Washington, which prefixed to them the editorial comment that it had "thought the subject almost too clear for controversy, and when elucidated by the able opinion of the Supreme Court scepticism itself could no longer doubt." [2] "The claim to this most dangerous power," the writer of the letters said, "was first founded on a clause in the compact which indirectly conferred this power, as they allege, and which now, fortified by precedents and if not resisted, will become the law of the land." In an elaborate argument as to the supremacy of the Legislature, he pointed out "the danger and inconsistency of such a power residing in the Judges." These letters were answered with great ability by another writer in the same newspaper, who said: "It has always appeared to me a matter of astonishment that

[1] *Independent Chronicle*, June 16, 1803; *Republican Watchtower*, June 25, 1803.
[2] *Washington Federalist*, April 20, 22, 27, 29, 1803.

a power, should be denied, which is so necessary and so clearly defined, as that of the Judges of the United States to declare a law unconstitutional, or in other words, to pronounce the Constitution of superior obligation to the law. . . . The Judges do not pretend to a right to suspend or nullify the acts of the Legislature. But if a law conflict with the Constitution, the Judges are bound to declare which is paramount. The Judges here arrogate no power. It is not they who speak — it is the Constitution, or rather, the people. The Judges have no will; they merely declare what is law, and what is not." He pointed out that the two great pillars of the argument of the "Unlearned Layman" were first, a supposed supremacy of the Legislature and second, a supposed control of the Legislature by the Judges, whereas, in reality, it was the people and the Constitution which controlled. "The Legislature is not the supreme power in the United States. . . . It is but an emanation from that supreme power. The voice of the people expressed in the Constitution limits the Legislative power and controls its will. . . . What is the use of checks and balances in a government? Is it not to control the violence of the passions, to check ambition, and to form a shield from persecution? . . . If the President or Judges depart from their duty, they may be impeached, and should there be no barrier to the violence, the persecution or the ambition of the Legislature? This shield from oppression is the Judiciary."

That contemporary criticism of the opinion was chiefly directed at its announcement of a power to control Cabinet officials is further interestingly shown by a correspondence (not published at the time) between two North Carolina Republicans — Gen. John Steele, formerly United States Comptroller of the

Treasury, and the noted Nathaniel Macon.[1] Steele, after elaborately attacking the Court for its erroneous action in trespassing on the functions of the Executive, proceeded to denounce the "fashionable doctrine which it (the *Mandamus Case*) was made use of to establish that the Courts have power to pronounce acts of Congress unconstitutional and void." "Whence originates," he asked, "the error in supposing that the Judges possess this new and gigantic power? I answer in the facility with which small bodies of men can be brought to embrace an opinion favorable to their own dignity and official influence, to the common interest which gentlemen of the law feel throughout our country in extending their sphere of action by increasing the jurisdiction of the Judicial Department, and as a necessary consequence the chances of litigation — but above all to inaccurate notions, which are perhaps the offspring of the foregoing combination, concerning the original distribution of powers by the Constitution, and the indulgence with which that department, on account of its weakness, has been regarded by a generous people." To this letter, however, Nathaniel Macon, who was one of the strongest of the leaders of the Republican party, replied that he was of the opinion that the Judges possessed the power to pass upon the validity of the statute, and that the case had been correctly decided, although "the reasoning which led to the conclusion seems to be directly opposed to it, and puts me in mind of a noted member of Congress who always spoke on one side and voted on the other. If they had no power to determine on the merits of the complaint, they had no authority to grant the rule in the first instance, and the mandamus ought not to

[1] See *James Sprunt Hist. Monograph No. 3* (*Univ. of No. Car. Publ.*, 1902), letter of John Steele to Macon, April 11, 1803, and of Macon to Steele, June 11, 1803.

have been issued; the argument on which the question seemed to be decided had nothing to do with the question, but certainly had a squinting towards another." [1]

That the holding of an Act of Congress to be unconstitutional excited little attention or apprehension was interestingly shown by the fact that within six months after the decision of the *Marbury Case*, another Federal statute was declared to be in conflict with the Constitution, by the Circuit Court for the District of Columbia, in *United States* v. *Benjamin More*. This case, by a singular chance, again involved rights of the justices of the peace of Washington. The Act of February 27, 1801, which granted them certain fees, had been repealed by an Act of May 23, 1802; and a defendant justice, on being indicted for receiving fees, contended that the repealing act was in violation of Section One of Article Three of the Constitution which prohibited the diminishing of compensation of Judges of the Supreme and inferior Courts of the United States. The Circuit Court through Judges Cranch and Marshall (Chief Justice Kilty dissenting) held that "a justice of the peace for Washington County in the District of Columbia is a judicial officer of the United States under the Constitution and that therefore the Act of Congress of May 23, 1802, so far as the same relates to the abolition of the fee of justices of the peace, is unconstitutional and void." [2] Although this decision was published in full in the Administration papers in Washington and elsewhere, the exercise of

[1] Macon further said: "The Courts must make every declaration of the unconstitutionality of a law at their peril; because the Judges are made accountable for their conduct by the Constitution, and if Judges could declare acts void, without being liable for their actions, they would be the supreme authority of the Nation and that without control — and the only department in the Government where a power might be exercised to any degree, without the least check or control by any other department of the Government."

[2] *National Intelligencer*, Aug. 5, 1805; *Republican Watchtower*, Aug. 9, 1803. The case does not appear to have been noted by legal historians.

judicial power with respect to this Republican legislation evoked no criticism of any kind.

The fact is, that, so far from being a power "usurped" by Chief Justice Marshall and theretofore unrecognized by the general public, the right of the Judiciary to pass upon the constitutionality of Acts of Congress had not been seriously challenged until the debate in 1802 on the Circuit Court Repeal Act. Prior thereto it had been almost universally recognized, and even in 1802, it was attacked purely on political grounds and only by politicians from Kentucky, Virginia, North Carolina and Georgia.[1] While law writers have hitherto refuted the charge of "usurpation" by citing the views of statesmen in the Federal Convention of 1787 and the opinions of State and Federal Courts prior to 1802, even more conclusive disproof of the charge is to be found in an examination of the current literature of the years from 1789 to 1802. At no period in American history were political questions more generally, more thoroughly, and more hotly discussed in print than during the first fifteen years after the formation of the Constitution. Every political, social or legal doctrine upheld by either the Federalists or the Anti-Federalists was debated and denounced by their opponents, in editorials, in letters to the newspapers, and in privately published pamphlets. More-

[1] In *Defence of the Measures of the Administration of Thomas Jefferson* (1804), by "Curtius", 36, 37, John Taylor of Carolina deplored the judicial power but did not deny its existence. Three years before, however, John Taylor, writing to Wilson A. Nicholas, Sept. 5, 1801, expressly admitted the existence of the judicial power, for he said (relative to the Circuit Court Act of 1801): "The responsibility of the Judiciary cannot begin until Congress shall perform their function. Then the question will occur whether the abolition of a Court abolishes the salary constitutionally. The responsibility falls on the Judiciary." *Jefferson Papers, Mass. Hist. Soc. Coll.* (1900). Practically no evidence of opposition to judicial power appears in the newspapers of 1803 or 1804, other than a letter from a correspondent of the *Aurora*, March 6, 1804, who wrote that the claim of a power of suspending laws to be exercised by the Judiciary was a part of the "Federalist system of aristocracy."

over, resolutions of the Legislatures and formal toasts offered at banquets and public meetings were often the vehicle for announcement and denouncement of political doctrines on both sides. An extensive examination of these sources of expression of public opinion discloses the fact that, from 1789 to 1802, there was almost no opposition to the exercise of the power of the Court to pass upon the validity of statutes, and that it had been almost unchallenged, until the debates in Congress in 1802 over the repeal of the Federalist Circuit Court Act. Had there been any great popular discontent at this action of the Judiciary, it would have revealed itself in letters or editorials in prominent Anti-Federalist papers like the *Aurora*, in Philadelphia, the *American Citizen*, in New York, the *Virginia Argus*, in Richmond, or the *Independent Chronicle*, in Boston, whose columns teemed with attacks upon every other alleged "outrage" or "usurpation" committed by Federalist officials and by Federalist Judges. Yet these newspapers, and similar partisan journals of less wide circulation, contain practically no evidence of any challenge of judicial power between 1789 and 1802.[1] Only two serious attacks upon this function of the Court were published — one by a Federalist, Zephaniah Swift, in 1795, in a treatise on the law of Connecticut, and the other by an Anti-Federalist, Charles Pinckney of South Carolina, in a series of newspaper letters in the campaign of 1800; and as to Pinckney's attack, a number of subscribers to a leading Anti-Federalist paper wrote that if Pinckney's views "were to grow into general opinions, they would be infinitely more alarming to the liberties of the people

[1] Beveridge, in his *Marshall*, III, 116, says: "Both Federalist and Republican newspapers had printed scores of essays for and against the doctrine." Examination of the papers does not seem to support this statement.

than any of the doctrines which he attempts to refute." [1] It has sometimes been asserted by modern writers that the Kentucky and Virginia Resolutions of 1798–99 were a denial of the existence of this power, and that in them "the first outspoken revolt against judicial control appears." [2] An examination of the current publications of the period reveals the fact that, on the contrary, the very men who drafted and proposed these Resolutions fully recognized without dispute this function of the Courts.[3] Thus, George Nicholas,

[1] *A System of the Laws of the State of Connecticut* (1795), by Zephaniah Swift, I, 51–53; *Letters from a South Carolina Planter* (1800), by Charles Pinckney; *Wharton's State Trials* (1849), 912. Pinckney wrote in 1799: "Upon no subject am I more convinced than that it is an unsafe and dangerous doctrine in a republic, ever to suppose that a Judge ought to possess the right of questioning or deciding upon the constitutionality of treaties, laws or any act of the Legislature. It is placing the opinion of an individual, or of two or three, above that of both branches of Congress, a doctrine which is not warranted by the Constitution, and will not, I hope, long have many advocates in this country." *Economic Origins of Jeffersonian Democracy* (1915), by Charles A. Beard; *Independent Chronicle*, Nov. 25, 1799. See also speech of Charles Pinckney, on his bill to prevent the Judges from holding any other office, in which he said: "It is our duty to guard against any addition to this bias which a Judge, from the nature, of his appointment, must inevitably feel in favour of the President. It is more particularly incumbent on us, when we recollect that our Judges claim the dangerous right to question the constitutionality of the laws; and either to execute them or not, as they think proper; a right, in my opinion, as unfounded and as dangerous as any that was ever attempted in a free country. They, however, do exercise it." *6th Cong., 1st Sess*, 101, March 5, 1800.

[2] As an example of this misstatement, J. Hampden Dougherty, in *Power of the Federal Judiciary over Legislation* (1912), 83, states: "History furnishes convincing proof as to the date when the doctrine that the Supreme Court has no power to set aside legislation was first explicitly announced. It never appeared until the formulation of the Virginia and Kentucky Resolutions in 1798–1799. These Resolutions denied this power and asserted the right of the separate States to judge whether acts of their own Legislatures conflicted with the organic law of the Union, and to repudiate Acts of Congress which they deemed unconstitutional. . . . It is in the Virginia and Kentucky Resolutions that the first outspoken revolt against judicial control appears." Beveridge, in his *Marshall*, III, 105, 106, 108, 116, makes the same statement.

[3] See as to these Resolutions in general: *The Kentucky Resolutions of 1798* (1887), by Ethelbert D. Warfield; *History of the Kentucky and Virginia Resolutions* (1880), by Elliott Anthony; *History of Kentucky and Kentucky Men* (1912), by E. Polk Johnson; *History of Kentucky* (1824), by Humphrey Marshall; *Kentucky Resolutions of 1798*, by Edward Channing, in *Amer. Hist. Rev.* (1915), XX; *The American Nation; The Federalist System* (1906), by J. S. Bassett; *Letter of George Nicholas to his friend in Virginia, Nov. 10, 1798, justifying the conduct of the citizens of Kentucky as to some of the late measures of the general government; and correcting cer-*

the leader of the Kentucky Bar, who, with John Breckenridge, was chiefly influential in securing the adoption of the Resolutions in Kentucky, wrote at the time in their defense, quoting Alexander Hamilton, and saying: "As long, therefore, as the Federal Courts retain their honesty and independence, our Constitution and our liberties are safe; and a corrupt faction which should enact, and be desirous of enforcing unconstitutional acts would be placed in this dilemma; if they attempted to enforce them, the Courts would declare them to be void; if they did not make the attempt, it would amount to an acknowledgement on their parts that they were unconstitutional, which would certainly and deservedly bring both the President and Congress into contempt and disrepute with, and excite against them the hatred of, the good people of the United States." John Breckenridge himself, in the debate in the Kentucky Legislature in November, 1798, while denying emphatically that the Congress were "the sole judges of the propriety and constitutionality of all acts done by them" and while supporting the right of the States in the last resort, to pass upon the constitutionality of a statute, admitted at the same time that the Judges might refuse to act under such statute on the ground of its unconstitutionality.[1] The chief sponsors of the Resolutions in Virginia, Thomas Jefferson and James Madison, had each admitted the existence of judicial power. As late as 1798, Jefferson had written: "The laws of the land, administered by upright Judges, would protect you from any exercise of power unauthorized by the Constitution of

tain false statements which have been made in the different States of the views and actions of the people of Kentucky, in *National Magazine* (ed. by James Lyon, Richmond, June, 1799), I, 217.

[1] See *The Kentucky Resolutions of 1798* (1887), by Ethelbert D. Warfield, 93 *et seq.*

the United States."[1] And Madison, in his report to the Virginia Legislature in 1799, expressly declared that his Resolutions were expressions of opinion, unaccompanied with any other effect than what they may produce "by exciting reflection. The expositions of the Judiciary, on the other hand, are carried into immediate effect by force." Thirty years later, when his Resolutions were being cited in support of the Nullification movement, Madison clearly pointed out in numerous letters that they did not constitute or imply any denial of the supremacy of the Judiciary.[2] That this was the view of the Virginia Convention is shown by the fact that during the exhaustive debate but two references were made to the power of the Judiciary. General Henry Lee (a Federalist), in discussing the various steps which might be taken to counteract the obnoxious Congressional legislation, cited popular elections, amendment to the Constitution, and also that "the Judiciary was a source of correction of Legislative evil, a source fixed by the Constitution and adequate to our violations of the same." This assertion was answered by the radical Republican, John Taylor of Caroline, who, while admitting the power of the Judiciary, considered that "the Judges by the Constitution are not made its exclusive guardian."[3] So also in the replies to the Resolutions sent by the various State Legislatures of the North, while the

[1] *Jefferson*, VIII, letter to Archibald H. Rowan, Sept. 26, 1798; *ibid.*, V, letter to M. de Meusnier, Jan. 23, 1786.

[2] *Madison*, VI, 332, 341 *et seq.*, 402; *ibid.*, XI, letters to J. C. Cabell, Sept. 7, 1829, Edward Everett, Aug. 28, 1830, R. Y. Haynes, Jan. 19, 1830, James Robertson, March 27, 1831, Nicholas P. Trist, Dec., 1831, William C. Rives, March 12, 1833. See also *Virginia Argus*, Feb. 15, 1800.

[3] As to contrary views, see resolutions in *Guardian of Freedom* (Frankfort, Ky.), Aug. 7, Sept. 11, Oct. 8, 1798; *Times and Alexandria Advertiser* (Va.), Oct. 4, Nov. 1, 1798. See also letters in the newspapers, as, for instance, *Virginia Argus*, April 12, 1800, and *Times and Alexandria Advertiser* (Va.), Dec. 15, 1798, letter of "The Independent of Dumfries" in reply to "Virginiensis."

majority members, being mostly Federalist, opposed the Virginia-Kentucky doctrines as unnecessary, since the Court was the final arbiter of constitutional questions, the Republican minorities did not challenge the Court's power, but took the position that decisions as to constitutionality of Acts of Congress did not rest "*solely* with the Judicial Department", the individual States retaining power to oppose the decision by political methods.[1] The Republicans had no disposition to deny the right of the Court to hold a statute invalid, for that which they feared was encroachment by Congress on the domain of the States and not encroachment by the Courts on the domain of Congress. The principle of State veto asserted by the Virginia and Kentucky Resolutions was intended to operate only in cases of a law judicially held constitutional; it had no reference to laws so held unconstitutional. That such was the contemporary view of the Resolutions is shown by the fact that the newspapers of the period, with very few exceptions, expressed no doubt as to the existence of the authority of the Judges to determine the invalidity of an Act of Congress; for, as a Baltimore paper said: "It is their (the Judges') province and their duty to construe the Constitution and the laws, and it cannot be doubted but that they

[1] See *Contemporary Opinions of the Virginia and Kentucky Resolutions*, by Frank M. Anderson, *Amer. Hist. Rev.* (1899), V; *State Documents on Federal Relations* (1911), by Herman V. Ames. See also a widely reprinted editorial from the *Albany Register*, quoted in *Virginia Argus*, March 5, 1799; *Independent Chronicle*, Feb. 25, 1799: "It is impossible to conceive a doctrine more opposed to the Constitution of our choice than that a decision as to the constitutionality of all Legislative acts rests solely with the Judiciary Department; it is removing the cornerstone on which our federal compact rests; it is taking from the people the ultimate sovereignty and conferring it on agents appointed for specified purposes; it is giving to an Administration the power of passing what laws they please, and of course a power to set at defiance the Constitution, whenever it may run counter to their projects of tyranny and ambition. . . . If then a law is unconstitutional and oppressive, are the people bound by any one principle of the Federal compact to submit to its operation and to remain mere passive spectators, while their rights are not only taken from them, but, in fact, converted into engines of oppression?"

will perform this duty faithfully and truly. They will perform it unawed by political debate, uninfluenced by party zeal." [1]

So far as the Courts themselves had expressed their view, it was accurately stated by a State Judge shortly before the *Marbury* decision, that "until lately, there was but one opinion on this subject, it being uniformly conceded by the Bar and held by the Bench that the Court of Justice must necessarily possess and exercise the power." [2] As to Acts of Congress, the power had been asserted and exercised by the Federal Judges as early as 1792 in the Circuit Court in *Hayburn's Case;* and in 1799, the constitutionality of an Act of Congress had come before Judge Ellsworth in the Circuit Court and had been referred to the Supreme Court;[3] the constitutionality of the Federal carriage tax law had been considered and upheld by the Supreme Court in 1796 in *Hylton* v. *United States.*[4] By Judges

[1] *Federal Gazette and Baltimore Daily Advertiser,* March 2, 1799. See also interesting accounts of the actions of the various Legislatures, and letters from Virginia, *ibid.,* Jan. 2, 16, 22, 26, March 14, April 12, 1799.

[2] *Emerich* v. *Harris* (1803), 1 Binney, 416, 422.

[3] As to this little-known case, see quotation from a Charleston (S. C.) paper in *Albany Gazette,* Nov. 21, 1799; *Independent Chronicle,* Nov. 25, 1799: "We learn that the great question respecting the constitutionality of the . . . laws of Congress . . . giving a preference to debts due to the United States from an insolvent debtor, even where a specific property is already vested in another creditor and before the United States had acquired any judicial lien on it, came before the last Federal Circuit Court in this city in the case of the United States against Hopkins and other assignees of Halliday; but that it was thrown into the case of a special verdict to go before the Supreme Court for their decision, wherefore the opinions of the Circuit Court on the subject were dispensed with. It is to be regretted however that a decision did not take place, as the law, if supported, will affect in a most important degree, the interest of those who rest satisfied with the idea that they are safe in having mortgages and other securities for their debts, and which the law of Congress contemplates to set aside in favor of the United States. From the reason of the case, however, the comparatively narrow prerogatives in this respect of the crown of England, and the great inconveniences resulting from such a law, as well as the unanimous opinion of our State Court (in a late Case) against the unconstitutionality of the law, it is more probable that the same will be declared void by the Supreme Court of the United States."

[4] The power to pass upon the constitutionality of State statutes had been frequently exercised by the Federal Judges in the Circuit Courts; see *supra,* 66-69, and *Minge* v. *Gilmour* (1798), Federal Cases No. 9631; *Ogden* v. *Witherspoon*

of the State Courts, the power to declare State statutes invalid had been asserted or exercised in over twenty cases in eleven out of the fifteen States during the years between 1789 and 1802.[1]

In the Federal Convention in 1787 and in the State Conventions on the adoption of the Constitution, a majority of the Anti-Federalist statesmen had recognized the power and the necessity for its existence, Samuel Adams saying in debate in the Massachusetts Convention that any law made by the Federal Government inconsistent with the Constitution "will be an error and adjudged by Courts of law to be void"; and Patrick Henry saying in the Virginia Convention: "I take it as the highest encomium on this country that the acts of the Legislature, if unconstitutional, are liable to be opposed by the Judiciary. . . . The Judiciary are the sole protection against a tyrannical execution of the laws." Elbridge Gerry (who later served as Vice-President with Madison) had also recognized it when, in opposing a proposition to make the Judiciary a part of a council of revision to assist in the enactment of statutes, he said: "They will have a sufficient check against encroachments in their own department by their exposition of the laws, which

(1802), Federal Cases No. 10461; but the exercise of this power arose, of course, under the jurisdiction granted by the Judiciary Act, and was based on a different reasoning from that which sustained the Court's action with reference to Federal legislation.

[1] For full compilation of these cases, see Committee Report in *New York State Bar Association Proc.*, Jan. 22, 23, 1915, republished as *Senate Doc. No. 941, 63d Cong., 3d Sess.*, Feb. 11, 1915. See also this report for full compilation of the views of Jefferson, Madison and the members of the Constitutional Convention of 1787. See also Committee's Third Report in *New York State Bar Asso. Proc.*, Jan. 12, 1917. And see especially on the subject of judicial review *The Doctrine of Judicial Review* (1914), by Edward S. Corwin; *The Courts, the Constitution and Parties* (1912), by Andrew C. McLaughlin; *Marshall*, III, appendix for collection of authorities; *Judicial Power and Unconstitutional Legislation* (1893), by Brinton S. Coxe. For valuable magazine articles, see notes, *infra*, and *American Judicial Veto*, by Noel Sargent, *Amer. Law Rev.* (1917), XLI; *The Relation of the Judiciary to the Constitution* (1919), by William M. Meigs; *Marshall*, III *et seq.*

involved a power of deciding on their constitutionality. In some States, the Judges had actually set aside laws as being against the Constitution. This was done too with general approbation." [1] Most of the leading Federalist statesmen and framers of the Constitution had recognized the existence and necessity of the power of the Court.[2] In the debates in the First Congress on the organization of the Department of Foreign Affairs, there was similar recognition.[3]

Attempts have been frequently made to establish the claim that Jefferson, whatever his previous views may have been, was opposed to Marshall's decision in *Marbury* v. *Madison* because of the exercise of the so-called "judicial veto" of an Act of Congress. It is clear, however, that Jefferson's hostility was due solely to the fact that Marshall had sought to interfere with the function of the Executive in making appointments, and after holding the statute unconstitutional had proceeded by *obiter dicta* to deliver a lecture to the President as to the rights of appointees to office.[4] And it is equally clear that Jefferson expressly admitted that the Court had the right to

[1] *Elliott's Debates*, II, 131, III, 324, 537, V, 151. See also *Records of the Federal Convention* (1911), by Max Farrand, I, 97.

[2] See especially *The Supreme Court Usurper or Grantee*, by Charles A. Beard, *Pol. Sci. Qu.* (1912), XXVII; *The Judicial Bulwark of the Constitution*, by F. E. Melvin, *Amer. Pol. Sci. Rev.* (1914), VIII. See also for a diverse view, *The Judicial Veto* (1919), by Horace A. Davis.

[3] See *The Doctrine of Judicial Review* (1914), by Edward S. Corwin, 51, citing speeches in the debates.

[4] *Jefferson*, X, 396 note, letter to George Hay, June 2, 1807: "On this I shall ever act, and maintain it with the powers of the government, against any control which may be attempted by the Judges, in subversion of the independence of the Executive and Senate within their peculiar department. I presume, therefore, that in a case where our decision is by the Constitution, the supreme one, and that which can be carried into effect, it is the constitutionally authoritative one, and that that by the Judges was *coram non judice*, and unauthoritative, because it cannot be carried into effect. I have long wished for a proper occasion to have the gratuitous opinion in *Marbury* v. *Madison* brought before the public, and denounced as not law, and I think the present a fortunate one, because it occupies such a place in the public attention."

decide upon the constitutionality of a law, so far as to enforce its decision upon the parties; and he only denied that such a decision was binding upon him as President in the performance of his purely Executive functions. Writing in 1804 on the question of his pardon of those who had been convicted under the Sedition Law, he said: "The Judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. The instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the Judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislative and Executive also in their spheres, would make the Judiciary a despotic branch." [1] This was the doctrine which he had set forth in a passage in a draft of his first message to Congress, December 8, 1801, but which he had omitted before its delivery: [2]

[1] *Jefferson*, X, 88, note, letter to Mrs. John Adams, Sept. 11, 1804.

[2] This omitted passage was first discovered and made public by Charles A. Beard in his *Economic Origins of Jeffersonian Democracy* (1915), 454, 455. See also *Marshall*, III, 52, Appendix A. The doctrine that the President in his Executive functions was not obliged to follow a decision of the Court was asserted, six months later, by Attorney-General Levi Lincoln in an opinion rendered to Jefferson, June 25, 1802, as to the effect of the decision in the case of *United States* v. *Schooner Peggy*, 1 Cranch, 103: "The Supreme Court who were competent to decide this principle have determined it in her case. It must, therefore, be considered as binding in this particular instance. Although they have fixed the principle for themselves and thereby bound others in reference to the case on which they have adjudicated, it can, I conceive, extend no further. In all other cases in which the Executive or other Courts are obliged to act, they must decide for themselves, paying a great deference to the opinions of a Court of so high an authority as the Supreme one of the United States, but still greater to their own conviction of the meaning of the laws and Constitution of the United States and of their oaths to support them." *Ops. Attys.-Gen.*, I, 119.

Our country has thought proper to distribute the powers of its Government among three equal and independent authorities, constituting each a check on one or both of the others, in all attempts to impair its Constitution. To make each an effectual check, it must have a right in cases which arise within the line of its proper functions, where, equally with the others, it acts in the last resort and without appeal, to decide on the validity of an act according to its own judgment and uncontrolled by the opinions of any other department. . . .

In other words, Jefferson claimed the right to pass upon the validity of an Act of Congress, in the performance of his purely Executive functions as President, in exactly the same fashion as he recognized the right of the Court so to do in performing its judicial functions.[1]

The fact is that the opposition to the Judiciary during the early years of the nineteenth century, found in both the Republican and the Federalist parties, was directed not so much at the *possession of the power* of the Court to pass upon the validity of Acts of Congress, as at the *effect of its exercise* in supporting or invalidating some particular measure in which the particular political party was interested. So far from denying the existence of the power to pass upon the constitutionality of the detested Sedition Act or of the obnoxious United States Bank Charter, the Republicans in 1800 and in 1819 complained of the Federal Court for its failure to declare these Acts to be unconstitutional; and prior to 1800 (as has been shown in a previous chapter) it was the Republicans (or Anti-Federalists) who had especially championed the right of the Court to protect the people and the States against the passage of unconstitutional laws by the Legis-

[1] Edward S. Corwin in *The Supreme Court and Unconstitutional Acts of Congress, Mich. Law Rev.* (1906), IV, says: "Yet I cannot find that Jefferson ever actually denied the right of the Supreme Court to judge of the validity of Acts of Congress."

latures. So, in the same manner, the Federalists in 1808 assailed the Federal Courts for failing to hold the hated Embargo Act unconstitutional. Unquestionably, if the Court had held either the Sedition Act, the Embargo or the Bank Charter unconstitutional, the party opposing those laws would have warmly applauded its action, and would have been little concerned over the question of the existence of the power of the Court. The history of the years succeeding 1800 clearly shows that, with regard to this judicial function, the political parties divided not on lines of general theory of government, or of constitutional law, or of Nationalism against Localism, but on lines of political, social or economic interest.[1]

It was not until the issue of State-Rights arose in the series of cases, beginning about 1815, that the Court became especially obnoxious to Jefferson and to the South in general;[2] but the antagonism then

[1] This thought has been well phrased by a recent legal historian as follows: "In the field of Federal law and politics, the conflict between the Republicans and the Federalists was over economic issues and not over any mere adjustments of the Constitutional system." *Economic Origins of Jeffersonian Democracy* (1915), by Charles A. Beard, 456.

[2] The first published letter of Jefferson attacking the power of the Judiciary to pass on the validity of statutes was written to W. H. Torrance, June 11, 1815, in regard to the action of a Tennessee State Court in holding a Tennessee stay-law invalid. See also letters to Spencer Roane, Sept. 6, 1819; W. C. Jarvis, Sept. 28, 1820; Thomas Ritchie, Dec. 25, 1820; Archibald Thweat, Jan. 19, 1821; Spencer Roane, March 9, 1821; Archibald Thweat, Dec. 24, 1821; Nathaniel Macon, Aug. 19, Oct. 20, 1821; James Pleasants, Dec. 20, 1821; William Johnson, Oct. 27, 1822, March 4, 1823, June 12, 1823. Other letters as to the power of State Courts to declare a State law invalid addressed to Jefferson seem to have remained unanswered by him. See letter of John H. Coleman, July 16, 1822, as to a Kentucky stay-law; and from Christopher H. Williams, Aug. 17, 1824, as to a Mississippi law. *Jefferson Papers, Mass. Hist. Soc. Ass.* A letter from Leonard J. Williams of the Ohio Legislature, July 28, 1809, asking Jefferson's opinion as to the power of the State Judges to hold an Ohio law invalid, and saying: "The question has agitated our State for two or three years and still threatens us with unpleasant forebodings. It has divided the Republicans into two contending parties," does not appear to have received any answer. *Thomas Jefferson Correspondence. Printed from the Originals in the Collection of William K. Bixby* (1916). *Western Law Monthly*, I, and *History of Ohio*, by Emilius O. Randall and Daniel J. Ryan, III, 155–162, V, 188–220.

aroused was over the exercise of a wholly different power, granted by the Twenty-Fifth Section of the Judiciary Act with respect to a conflict between State and Federal authority. Such action by the Court did not involve in any way the question of the right of the Court with respect to the acts of a coördinate department of the Federal Government. And had the Court then held the Judiciary Act unconstitutional, as the Republicans claimed it to be, its hottest opponents would have welcomed its action and would have found nothing to criticize in judicial power over Federal legislation, if exercised to such an end.

NOTE. That *Marbury* v. *Madison* was given much attention in the South is seen from the *Charleston Courier*, a leading Federalist paper just established in 1803 by a former Federalist editor of the *New England Palladium*. On March 3, 4, 1803, it published the debates in the Senate on the petition of the justices of the peace, and it quoted from the *Gazette of the United States* the accounts of Attorney General Lincoln's conduct in the hearing of *Marbury* v. *Madison* in the Supreme Court. On March 5, it published a two and one half column editorial as "to the petition of the justices" termed the Senate's refusal to open its records, "a picture of factious injustice, noxious though feeble." On March 7, it published another editorial of equal length, saying that the Anti-Federalists "suspect the Judiciary is adverse to that gentleman and they insist that the President is not nor shall be amenable to the Judiciary. Here we see democracy in proper person, full grown and fearless." On March 8, in another editorial of equal length, it said: "Is there any man will be audacious enough to say that this is a free country, if the Judiciary has not the power to support the private rights of its citizens against the encroachments of the Executive?" On March 11, 1803, it published the summary of the decision in *Marbury* v. *Madison* from the *National Intelligencer*, and on March 30, 31, April 1, it published the opinion of the court in full. On April 14, it published a long editorial on the Anti-Federalist opposition to the Judiciary as a grievance.

As late as 1834, the only ground on which the decision in the *Marbury Case* was attacked was for its support of the right of the Judiciary to interfere with the Executive by issue of mandamus. See esp. speech of William L. Rives of Virginia in the Senate, Jan. 17, 1834, *23d Cong., 1st Sess.*, p. 284.

CHAPTER SIX

IMPEACHMENT AND TREASON

1803–1808

That the decision in *Marbury* v. *Madison* did not evoke more hostility at the time it was rendered was undoubtedly due in part to the fact that another case was decided by the Court, only six days later, in a manner highly satisfactory to the Republicans. On March 2, 1803, an opinion was rendered by Judge Paterson in *Stuart* v. *Baird*, 1 Cranch, 299, sustaining the constitutionality of the Circuit Court Act of 1802, and finally setting at rest the bitter political struggle over this legislation. The result was as pleasing to the Administration party as it was unexpected. Two constitutional questions had been involved — one as to the right of Congress, by repealing the Act of 1801, to abolish the judicial positions therein created; the second as to the right of Congress to impose upon the Supreme Court Judges the duty of sitting in the new Circuit Courts. Immediately after its enactment in 1802, Chief Justice Marshall, finding that the June session of the Court had been abolished and that it was thus prevented from considering the question *in banc*, communicated with his Associate Judges, asking for their opinion whether they should comply with the new statute by performing the Circuit duty prescribed by it.[1] Writing to Judge Paterson, he said: "I hope

[1] The correspondence of Marshall on this subject appears hitherto to have escaped the attention of legal historians, and is to be found in *Paterson Papers MSS*, George Bancroft transcript, in the New York Public Library, letters of Marshall to Paterson, April 6, 19, May 3, 1802; letters of Judge Samuel Chase to Paterson,

I need not say that no man in existence respects more than I do those who passed the original law concerning the Courts of the United States, and those who first acted under it," nevertheless, he continued, after giving the subject independent investigation, he had formed an opinion, "which I cannot conquer, that the Constitution requires distinct appointments and commissions for the Judges of the inferior Courts from those of the Supreme Court. It is, however, my duty and my inclination, in this as in all other cases, to be bound by the opinion of the majority of the Judges, and I should therefore have proceeded to execute the law so far as that task may be assigned to me, had I not supposed it possible that the Judges might be inclined to distinguish between the original case of being appointed to duties marked out before their appointments, and of having the duties of administering justice in new Courts imposed after their appointments." After stating that his opinion was that there was no distinction, he said that he would be guided by the view of his Associates; and he concluded with a very striking appreciation of the seriousness of the decision now to be made: "This is a subject not to be lightly resolved on. The consequences of refusing to carry the law into effect may be very serious. For myself, personally, I disregard them; and so, I am persuaded, does every other gentleman on the Bench when put in competition with what he thinks his duty, but the conviction of duty ought to be very strong before the measure is resolved on. The law having been once executed will detract very much, in

April 6, 24, 1802; very long letter of Chase to Marshall, April 24, 1802, giving in detail his views as to the unconstitutionality of the Act; letters of Judge William Cushing to Paterson, May 24, June 3, 1802. See also an article by James Kent in *New York Review* (1838), III, in which it is said the facts as to Marshall's action had theretofore never "found their way into print."

the public estimation, from the merit or opinion of the sincerity of a determination not now to act under it." Replying to the inquiries of the Chief Justice for their opinion, Judges Paterson, Cushing and Washington all concurred in holding that, inasmuch as all the Judges first appointed to the Supreme Court had acquiesced in the statute requiring performance of Circuit duty, the question of constitutionality must be regarded as settled, though if the point had been new a doubt might arise. Judge Chase, on the other hand, expressed his view that the Act was unconstitutional and his earnest hope that the Judges should meet together and consult as to their future action, saying: "The burthen of deciding so momentous a question, and under the present circumstances of our country, would be very great on all the Judges assembled, but an individual Judge, declining to take a Circuit, must sink under it." Accurately prophetical, he added: "I believe a day of severe trial is fast approaching for the friends of the Constitution; and we, I fear, must be principal actors, and may be sufferers, therein." Finding that the majority of the Judges favored complying with the statute, Marshall wrote to Paterson that he was "privately gratified" and should "with much pleasure acquiesce in it, though if the subject had never been discussed, I should feel greatly embarrassed about it, myself." Accordingly, the Chief Justice and his Associates proceeded to hold their Circuit Courts as usual, much to the relief of the Republicans who unquestionably had anticipated that Marshall intended to overturn their legislation, and who now openly commended him for his course of action. In March, 1803, however, the question of the power of Congress to impose Circuit duty upon the Supreme Court Judges came before the Court in a case appealed

from the Circuit Court, *Stuart* v. *Laird*, and the Court formally sustained the constitutionality of the statute. It held that as the original Judiciary Act of 1789 contained provision for Circuit Court duty and as the Judges had performed such duty for twelve years, this practice and acquiescence for a period of several years commencing with the organization of the judicial system "affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not to be disturbed." [1] No more striking example of the non-partisanship of the American Judiciary can be found than this decision by a Court composed wholly of Federalists, upholding, contrary to its personal and political views, a detested Republican measure; and the case well justified the comment made by William Rawle in his *View of the Constitution* in 1825, that it illustrated the fortunate truth that in this Republic "party taint seldom contaminates judicial functions." It is interesting to note that the decision evoked from the most politically hostile papers of the day warm commendation of Marshall for "this one memorable act in supporting the Government on the question of the repeal of Judiciary Law (which) stands a living reproach to such as can believe . . . that you would surrender the chastity of the Court to the lust of envy. . . . The weight of your authority

[1] A suit was instituted by one of the deposed Circuit Judges in the 3d Circuit in New Jersey, *Joseph Reed* v. *Joseph Prudden*, presenting the question of the constitutionality of the repealing Act of 1802, and the power of the Supreme Court Judges to sit in the Circuit Courts. See *Charleston Courier*, May 9, 1803; *Washington Federalist*, May 13, 1803; *New England Palladium*, April 19, 1803. See also *National Intelligencer*, Oct. 4, Nov. 1, 1802, for account of another case presenting the question, before Judge Washington and Judge Law in the Circuit Court in Connecticut.

then calmed the tumult of faction, and you stood, as you must continue to stand, a star of the first magnitude." [1]

Both of the cases decided at this 1803 Term having unexpectedly resulted favorably to the Republican party, talk of the impeachment of the Judges relapsed during March, April and May of that year, though Jefferson himself still remained deeply irritated over Marshall's *dicta* in the *Marbury Case* and over the attempted, though unsuccessful, encroachment on his Executive power. Towards the end of May, however, Judge Samuel Chase gave the opportunity for which the Republicans had long been waiting to launch their attack on the Federal Judiciary. Of all the Judges, no one was more hated than Chase. His unnecessarily strenuous support of the Sedition Law, his prejudiced and passionate conduct of the trials of the two Republicans, Thomas Cooper and James T. Callender, under this law, his arbitrary and unusual rulings in the trial of John Fries for treason in resisting the Federalist direct tax laws, and his personal traits had long subjected him to vicious and unmeasured attack. The *Aurora* had charged that his disposition was so arbitrary and his temper so ferocious and disregardful of decorum that "few men, perhaps, hold an humbler estimation among his fellow citizens." [2] The active part which Chase had taken in behalf of Adams in the Presidential campaign had been particularly obnoxious to Jefferson and his party. "What would be the astonishment of the people of Great

[1] *Aurora*, April 26, 1803; *Republican Watchtower* (N. Y.), May 19, 1803; *Virginia Argus*, April 20, 1803 — all Republican papers. It is to be noted, however, that Marshall (as Cranch stated in his *Reports*) "having tried the cause in the Court below declined giving an opinion." The Court's decision affirmed the judgment in the Court below, which had been rendered on the technical sufficiency in form of the defendant's plea.

[2] *Aurora*, Jan. 15, 1801.

Britain if a Judge of the Supreme Court of that Nation should from the bench while the Court were in session make an inflammatory, electioneering harangue to the people in favor of the person of his choice?" wrote a newspaper correspondent in 1800. "What would be their distress in seeing the same Judge mounting the tub at an electioneering meeting of the people . . . and there expose the dignity of the National Judiciary to the coarse gibes and scoffing jokes of every mischievous bystander?" And Charles Pinckney wrote: "What think you, my friends, of our Supreme Judges electioneering at towns and county meetings, those grave and solemn characters who ought to be retired from the public eye, who ought never to be seen in numerous assemblies or mingle in their passions and prejudices, and who, with respect to all political questions and characters, ought ever to be deaf and blind to everything except what they hear in evidence? Can a man, brought before such Judges for sentiments expressed at an election, expect a fair trial, particularly if his expressions have been levelled at the candidate those Judges have been electioneering to support?" [1] Chase, moreover, had been prominent among those Judges who had delivered political charges to the Federal Grand Juries. Yet neither form of his political activity had hitherto been regarded as sufficient ground for impeachment. So strong and prominent a Republican as Nathaniel Macon, Speaker of the House since 1801, while stating his belief in Chase's "mental depravity", had expressed grave doubts whether a Judge ought to be impeached, "for expressing to a grand jury political opinions which every man was permitted to hold and express elsewhere"; and he asked: "Is

[1] *Virginia Argus*, Aug. 15, 1800, Philadelphia dispatch from the *Aurora*, letter of "an Englishman"; see *ibid.*, Aug. 19, 22, 1800; *Charleston Gazette*, Sept. 13, 1800.

error of opinion to be dreaded when inquiry is free? Is the liberty of the press of any real value when the political charges of a Judge are dreaded?" [1] Moreover, the general standards of that day did not demand so complete a separation of the judicial and political fields of action as was required at later periods. At the very outset of the new Government, Jay had held for six months the offices of Chief Justice and of Secretary of State of the United States, he ran for election as Governor of New York while still on the Bench, and for over a year he had been both Chief Justice and Ambassador to England in 1794; Ellsworth was for a year and a half Chief Justice and Minister to France; Cushing while on the Bench ran for Governor in Massachusetts in 1794; [2] Bushrod Washington was active in the Presidential campaign in 1800 in support of Charles C. Pinckney; [3] and Marshall served both as Chief Justice and Secretary of State for over a month in 1801. In the State Courts, three Judges of the Supreme Court of New Hampshire acted as Presidential electors; Chief Justice Dana of Massachusetts in a charge to the Grand Jury denounced the Vice-President and the minority in Congress as "apostles of atheism and anarchy, bloodshed and plunder"; Judge Addi-

[1] *Joseph H. Nicholson Papers MSS*, letters of Macon to Nicholson, July 26, Aug. 6, 1803; *The Congressional Career of Nathaniel Macon*, in *James Sprunt Hist. Monographs No. 3* (1902).

[2] The Anti-Federalist *Boston Gazette*, April 7, 1794, attacked Judge Cushing for his actions as a Federal Judge: "The citizens of New York, says a correspondent, gave a noble example, a year or two past, of their attachment to the sovereignty and independence of their State Government by rejecting from the Chair of First Magistrate a Federal Judge, notwithstanding the continued efforts of all Aristocrats and Tories with their powerful engines of bribery and corruption, to influence the citizens in the election for Judge Jay. The citizens of Massachusetts will follow the example of their brethren and show to the world that an officer in a foreign Government, who has warmly plead against the interest of this Commonwealth has no claim or pretension to the suffrage of its citizens, for Judge Cushing has forsaken Massachusetts and plead in this Federal Court *against* her independence."

[3] See *Life and Times of George Cabot* (1877), by Henry Cabot Lodge, letter of Cabot to Hamilton, Nov. 29, 1800.

son in Pennsylvania in 1800 delivered speeches in favor of President Adams to the Grand Jury; Chancellor Livingston of New York, and Chief Justice McKean of Pennsylvania engaged in the most active of partisan politics.[1] It is clear, therefore, that mere political activity had not been regarded as unfitting a Judge for his position. But while no action had been taken towards carrying into effect the threats of impeachment which had been hanging over Chase for three years, the Republican party was merely waiting for a favorable opportunity. It came in May, 1803, when, within three months after the decision of the Supreme Court in the *Marbury Case*, the Judge delivered a long charge to the Federal grand jury in Baltimore, in which he took occasion to express his views regarding certain State and Federal legislation. He attacked the Act abolishing the Circuit Judges, saying that "the independence of the National Judiciary is shaken to its foundation"; he also attacked the new State Constitution of Maryland and universal suffrage, which he said would "certainly and rapidly destroy all protection to property and all security to personal liberty, and our republican Constitution will sink into a mobocracy"; it was also reported that he had said that "the present Administration was weak, relaxed and not adequate to a discharge of their functions, and that their acts flowed, not from a wish for the happiness of the people but for a continuance in unfairly acquired power." The report of his charge containing this alleged criticism was published in the *National Intelligencer*, which bitterly assailed this "extraordinary performance" of the Judge, and closed with these words: "Such, citizens of the United

[1] *Aurora*, Dec. 4, 1798; *State Trials of the United States* (1849), by Francis Wharton, 46–47.

States, is the offspring of a Judge of the Supreme Court of the United States, a member of that venerable and sacred Bench constituted by you the guardian of your rights and liberties!" This article was widely republished in papers throughout the country, and was assailed or defended, according to the partisan bias of each paper.[1] Though Judge Chase repudiated the accuracy of the report of his charge, so far as it was said to have contained any attack on the Administration, it is difficult to believe that he was not firing directly at Jefferson when he used the following language: "The modern doctrines by our late reformers, that all men in a state of society are entitled to enjoy equal liberty and equal rights, have brought this mighty mischief upon us, and I fear that it will rapidly destroy progress, until peace and order, freedom and property shall be destroyed."[2] At all events, there was no doubt that he had criticized the repeal of the Circuit Court Act which had been one of the pet measures of the President, and Jefferson was in no mood to overlook such criticism by a Judge on the Bench. "Ought this seditious and official attack on the principles of our Constitution and on the proceedings of the State to go unpunished?" he wrote to Joseph H. Nicholson,

[1] See *National Intelligencer*, May 20, 1830; the *Aurora*, May 24, 27, 1803. The *Virginia Argus* said, June 11, 1803: "Was this man placed in his high office by the people to become the calumniator of the government of their choice; or was he not rather placed there to administer justice conformable to the Constitution of the United States? Is it proper, is it decent that this man should be forever making political speeches from the Bench? . . . I hope, for the honor of the Federal Judges, that he is singular in his political tenets. If he be not, they will prove a curse instead of a blessing to this country."

On the other hand, the *Charleston Courier*, a Federalist paper, June 7, 1803, spoke of Chase as "a magistrate distinguished no less for his integrity and patriotism than for wisdom, penetration, sagacity, and legal and constitutional knowledge", and on June 8, it said: "We feel that the attacks which have been made, first upon the Judiciary in general, and afterwards upon the constitutional rights of the Judges, call loudly for animadversion."

[2] See letter to *Baltimore Anti-Democrat*, June 25, Sept. 5, 1803; *Washington Federalist*, July 20, Aug. 5, 1803.

one of his party leaders in Congress; and at the advice of most of the Republican press and pursuant to the President's wishes, conferences were at once held among the leading Republicans, with a view to the institution of impeachment proceedings against Chase.[1] The move was regarded by the Federalists as an attempt to overawe and eliminate the Judicial branch of the Government by the Executive and Legislative. "We see these last," said the *Charleston Courier*, "shaking hands and conspiring for the overthrow of that third branch of the Constitution — the Judiciary — in which the Constitution deposited the right of expounding and administering the laws, to prevent, not by its own discretionary power, but by a just application of the letter of the law to cases as they might arise, any excesses, any attempts by the other two parts or either of them. . . . It is a mountain that must be got out of the way; and not only the Faction cry it down and dare to strike at its awful head, but the Legislative conspire to cripple, not to utterly destroy it to be sure, but to palsy and put it into a state of non-effective, impotent existence. And now the country can discern in it only the shadow of a departed protector. . . . Why is the Judiciary become hateful to the democratic party? Because it is the only security against their designs." [2] "I understand that it is the intention of the party to impeach every Judge, who in his charge has given a political opinion," wrote Timothy Pickering to his correspondents.[3] "The Judges of the Supreme Court are all Federalists. They stand in the way of ruling power. Its satellites

[1] See *Aurora*, March 31, June 15, 1803; *Jefferson*, X, letter of May 13, 1803.

[2] *Charleston Courier*, June 9, 10, 13, 1803.

[3] *Pickering Papers MSS*, letter of Pickering to Higginson, Jan. 6, 1804; *Life and Letters of George Cabot* (1877), by Henry Cabot Lodge, letter of Pickering to Cabot, Jan. 29, 1804.

also wish to occupy their place. The Judges, therefore, are, if possible, to be removed. Their judicial opinions if at all questionable, though mere errors of judgment, are interpreted into crimes and to be grounds of impeachment." While this prediction was not fulfilled, the Republicans were determined on making an example of at least one Judge; and accordingly on January 6, 1804, the House of Representatives appointed a committee "to enquire into the judicial conduct of Samuel Chase, one of the Associate Justices of the Supreme Court of the United States, and to report their opinion whether the said Samuel Chase hath so acted in his judicial capacity as to require the interposition of the constitutional power of the House."

The attitude of the Republicans toward the impeachment was well illustrated by an editorial in the *Independent Chronicle:* "Whence and for what cause has originated this novel cry about the sanctity and impunity of Judges? It seems as if they had a charter from heaven to do as they pleased, and it was sin against the elect to say, why do ye so? . . . Judge Chase has tried many a man, and doubtless acquitted some. It is his turn now to be tried, and this will be performed by at least as good and learned men as himself . . . namely the Senate of the United States. And doubtless that degree of justice that he has meted to others will be shown to him. His enemies wish him nothing worse." And the *Aurora* said: "The impeachment does not endanger the Constitution or the just independence of the Judiciary; the declaration that it does, if credited, would be highly injurious, for if it can once be believed that a properly conducted inquiry and trial are dangerous to the Judiciary branch of government, adieu to the benefits which

ought to be derived from the responsibility of the Judges." And again it said: "Let everyone pray that the abhorrence of the Nation for the conduct of this Judge may be speedily evidenced by his expulsion from office by their representatives. Never, never was the Bench so much disgraced as by Judge Chase; talk of Jeffries, and in comparison with Chase, he was a faithful officer and honest man." [1]

On the other hand, the extreme Federalist view was illustrated by the *Columbian Centinel*, in Boston, which said that: "The high confidence reposed in him by his countrymen and Washington is the best voucher of his integrity. Incorruptible in all his views, he fears not investigation; and though he knows how feeble is the barrier of innocence, when opposed by party spirit and power, he bears up with dignity under the load of obloquy; and posterity will say of him he was 'the man who dared to be honest in the worst of times.'" [2] And the *Connecticut Courant* said that: "This is a subject of such vast importance to the whole people

[1] *Independent Chronicle*, said Jan. 30, 1804; see *ibid.*, April 26, 1804: "His character is not only suspected but spotted by a series of arbitrary and iniquitous conduct which would have added a deeper line to the infamy of Jeffries himself." *Aurora*, March 21, 22, 1804; the *National Aegis* (Worcester, Mass.) said, Jan. 25, 1804: "All the Federal papers . . . seem to be in a terrible flustration"; *ibid.*, March 14, 21, 28, May 2, 1804.

[2] *Columbian Centinel*, April 14, 1804; *Connecticut Courant*, Feb. 27, 1805. The correspondence of William Plumer, Senator from New Hampshire at this time, in 1804, shows the general view of the Federalists in Washington. On Jan. 26, he wrote as to "the attempt to break down and destroy the security and independence of the Judiciary, the constitutional bulwark of freedom and make it subservient to the Executive"; on Feb. 2: "To secure the re-election of Jefferson the Constitution is now to be changed. To increase his power and influence, the Judges of the Courts of Law are to be removed; impeachments are to succeed impeachments, till every Judge of the Supreme Court are not only removed but disqualified to hold an office, when more pliant minds and accommodating opinions will succeed"; on March 17: "It seems to be understood by the *Sect* that for a Judge to be impeached and to be convicted and removed from office are synonymous terms, except as to the time of removal"; on March 19: "Impeachments are to be considered only as signals given by the House to the Senate to remove Judges from office, and the question is not — whether the accused is guilty of crimes, but, must he be removed?" *Plumer Papers MSS.*

of the Union that it cannot fail to excite the earnest attention of all men of sober reflection. The first object of the mammoth of faction was to level with the dust the National Judiciary, or at least to render it completely subordinate to the other branches of the government. This object being in a manner effected, the next was to hang a rod over the bench of justice by degrading and displacing those of the Judges who had rendered themselves most obnoxious to certain violent demagogues. Judge Chase was marked for the first victim. . . . All possible means have been used to embitter the public mind against him and to consign him to infamy and execration. . . . Behold this aged patriot, one of the pillars in our revolutionary struggle, rudely dragged by a Virginian stripling before the National tribunal."

These examples are typical of the attacks and defenses of the Judge which appeared throughout the country. Both were exaggerated. Chase was not a Jeffries; neither was he a Marshall. He was at this time sixty-four years of age; he had been in the practice of the law for forty years. Joseph Story, who paid him a visit, two years later, described him as "the American Thurlow, bold, impetuous, overbearing and decisive . . . but with all his plainness of manners, I confess that he impressed me with respect." District Judge Richard Peters wrote of him in 1804: "Of all others, I like the least to be coupled with him. I never sat with him without pain, as he was forever getting into some intemperate and unnecessary squabble." [1] The acts for which he was now to be im-

[1] Peters continued: "If I am to be immolated, let it be with some other victim or for my own sins." *Pickering Papers MSS*, XXVII, 46; and again he wrote, *ibid.*, XXXI, 101: "Chase started with me on the *grand pas*. I gave him a complete tongue lashing; after which he was broke in, and perfectly manageable. Yet I narrowly escaped sharing in the consequences of his hasty measures, which I

peached certainly did not arise out of corrupt or improper motives; neither were they intentionally arbitrary or illegal; nor were they "prompted by a spirit of persecution and injustice" as charged; but they were undoubtedly such acts as a calm and scrupulous Judge would not have committed. It is unnecessary to recite them in detail. In general, they consisted of legal rulings and course of conduct towards the defendants and their attorneys in the trials of John Fries and James Callender in 1800; of his unsuccessful attempt to secure an indictment under the Sedition Law in Delaware; and of his charge to the grand jury in Baltimore in 1803. Of all of these, the last only would, in calmer days, have been deemed a ground for impeachment. But party spirit ran high; politics, rather than legal discrimination, moved Congress; and the general public seemed to accept the fact that the prosecution was a purely party move. "There was a time," wrote Fisher Ames, "when I was foolish enough to think the examination of a public question of some public importance; but since party reasons are the only ones sought for and regarded, I am duly and humbly sensible of the impertinence of urging any other. . . . You may broil Judge Chase and eat him, or eat him raw; it shall stir up less anger or pity than the Six Nations would show if Cornplanter or Red Jacket was refused a belt of wampum." [1]

Meanwhile, during the violent political discussion over impeachment of one of its members, the Court met for its regular Term in February, 1804, and disposed of the unusual number of twenty-two cases.[2]

highly and decidedly disapproved." See also long letter from Peters to Pickering, Jan. 24, 1804, describing the Fries and Cooper trials. *Peters Papers MSS.*

[1] *Works of Fisher Ames* (1854), letter of Jan. 20, 1805.

[2] The beginning of the Term in 1804, was thus described by the *Washington Federalist*, Feb. 9: "On Monday (Feb. 6) the Supreme Court of the United

In two of these, it again displayed the high independence in its relation to the Executive which had characterized it from the outset; and those Republican partisans who considered the opinion in the *Marbury Case* to be an attack upon President Jefferson were now shown that the Chief Justice was equally prepared to attack the acts of other Presidents. In *Little* v. *Barreme*, 2 Cranch, 170, which had been argued at the December Term, 1801, by Samuel Dexter against Martin and Mason, and an opinion in which was not delivered until February 27, 1804, Marshall held that Presidential instructions issued by President Adams, if not in accord with the statute, were of no avail to protect an officer acting under them, and that "the instructions cannot change the nature of the transaction, or legalize an act which, without these instructions, would have been a plain trespass." [1] "I confess," said Marshall, "the first bias of my mind was very strong in favor of the opinion that, though the instructions of the Executive could not give a right, they might yet excuse from damages. . . . I have been convinced that I was mistaken." And in another case at this Term, the Court showed its determination to confine Executive power to its lawful limits, when in *Murray* v. *The Schooner Charming Betsy*, 2 Cranch, 64, upon an offer by counsel to read certain instructions of President Adams, Judge Chase

States commenced its session in Washington. On Tuesday, the Chief Justice and the Associate Justices, Cushing, Chase and Washington attended and proceeded to business. Judge Paterson is not yet sufficiently recovered from the great injury he sustained from being upset on his way home from Albany last fall to be able to travel. Judge Moore (of North Carolina) is daily expected. There is much important business before the Court, this Term."

[1] Hampton L. Carson in his *History of the Supreme Court*, 209, makes the mistake of stating or assuming that the instructions were issued by President Jefferson and that it was Jefferson whose action Marshall was attacking in this case. It is interesting to compare this case with the doctrine of law upheld by the German Court at Leipzig, in 1921, in the trial of German war criminals. See *Superior Orders and War Crimes*, by George A. Finch, *Amer. Journ. Int. Law* (1921), XV.

remarked that "he was always against reading the instructions of the Executive; because, if they go no further than the law, they are unnecessary; if they exceed it, they are not warranted." [1] That the Court was equally strict in restraining the Legislative branch of the Government from overstepping its proper bounds was shown in *Ogden* v. *Blackledge*, 2 Cranch, 272. This case, involving the payment of a British debt and arising on certificate of division of opinion by the Judges of the Circuit Court in North Carolina, presented the question whether a statute of limitations enacted in 1715 had been repealed by a later statute of 1789 inconsistent in terms, a still later statute of 1799 having specifically provided that the Act of 1715 should be deemed unrepealed and in full force. The Court, in an opinion rendered by Judge Cushing, insisted on the complete division between the Judicial and

[1] In the trial of *United States* v. *Smith*, 3 Wheeler Criminal Cases, 100, Federal Cases No. 16342, in July, 1805, on an indictment for a military expedition in breach of the neutrality laws, the defendants asked for a subpoena to the Secretary of State in order to prove that the expedition had been undertaken with the encouragement and consent of President Jefferson, Judge Paterson refused the motion, saying: "The defence proceeds altogether upon the idea that the Executive may dispense with the laws at pleasure — a supposition as false in theory as it would be dangerous and destructive to the Constitution in practice. . . . The judiciary surely will never give its sanction to so gross a violation of these principles as would take place if the defence which now is attempted to be made were allowed to prevail." See especially opinion of Attorney-General Breckenridge to the President, March 18, 1806, in *26th Cong., 2d Sess.*, House Doc. 123: "It would be a principle by which the honor and dignity of the Government might be wickedly assailed. To presume that those who administer this Government would stoop to vindicate their honor, or that of the Government, from the charges or calumny of any offender who may be arraigned before our tribunals, and who may attempt to implicate them in his guilt, is presuming on a state of personal, as well as National degradation, of which this Government will not furnish an example. It would be affording a weapon with which every conspicuous offender might attempt to wound the Administration; as by only making the allegation, he would claim the right to call upon any of the high officers of the Government to justify his defence or to exculpate themselves. A practice so embarrassing and humiliating cannot possibly, I presume, be attempted to be introduced in any Court whatever. But admitting such testimony could be asked for, it would, if introduced, be wholly irrelevant; for, the President having no power to arrest or dispense with the operation of this Act, his assent, or even order, that it should be violated would not shield from its pains and penalties those offending against it."

Legislative branches of Government required by American State and Federal Constitutions. For while Robert G. Harper and Luther Martin for the plaintiff were arguing that the State statute of 1799 was invalid, on the ground that "to declare what the law is or has been is a Judicial power; to declare what the law shall be is Legislative. One of the fundamental principles of all our governments is, that the Legislative power shall be separated from the Judicial," the Court "stopped the counsel, observing that it was unnecessary to argue the point." In its final decision, it held that, notwithstanding the Act of 1799 expressly provided that the Act of 1715 "shall be deemed, held and taken to be in full force," nevertheless, the Act of 1715 was in law repealed by the Act of 1789; and it further held that since, at the time of the passage of the Act of 1789, the debt was not barred, the debtor had no vested right which could be impaired by the repealing Act. The fact should be noted that this was the first case argued in the Court which involved the Impairment of Obligation of Contract Clause of the Constitution.[1]

Two other cases — *Graves* v. *Boston Marine Insurance Co.*, and *Head* v. *Providence Insurance Company*, 2 Cranch, 127, 419, were of interest as presenting the first questions of corporation law decided since

[1] A case presenting a similar issue is reported in *Ogden, Adm'r. of Cornell* v. *Witherspoon, Adm'r. of Nash*, 2 Haywood (N. C.), 277, as decided at the Circuit Court for the District of North Carolina in Dec., 1802. At the end of his report, Hayward added the following note: "Note. This cause was removed to the Supreme Court by writ of error where it was also decided that the Act of 1715 had been repealed by the Act of 1789." This note is erroneous, as a search of the records and files of the office of the Clerk of the Supreme Court of the United States shows that no such case was entered in that Court on writ of error. The case is particularly interesting because of Chief Justice Marshall's opinion holding the State statute of 1799 invalid on two grounds — first as conflicting with the State Constitution denying to the Legislature strictly Judicial powers; second as conflicting with the Federal Constitution and impairing the obligation of contract.

1790,[1] the Court holding that if its charter prescribed a mode of contracting a corporation must observe that mode and could not contract otherwise. The cases were argued by Luther Martin of Maryland, David Hunter of Rhode Island, Richard Stockton of New Jersey, Robert G. Harper and Philip B. Key of Maryland, John T. Mason of Virginia, and John Quincy Adams of Massachusetts. The latter, a Senator, was admitted to practice at this Term, and in his diary noted that: "Feb. 8. Attended at the Supreme Court and in the Senate. Examining authorities with too much assiduity. Feb. 9. Supreme Court and Senate. Feb. 13. This attendance in the Senate and the Supreme Court at once almost overpowers me. I cannot stand it long." Of the argument, he wrote: "On the whole, I have never witnessed a collection of such powerful legal oratory as at this session of the Supreme Court." [2]

At the end of the 1804 Term, Judge Alfred Moore resigned, owing to ill health;[3] and to President Jefferson there now fell the opportunity of appointing the first Republican on the Court. As two Circuits (the Second and the Sixth) were unrepresented by any Judge, Jefferson felt that his choice should be made either from New York, or from Georgia or

[1] See *Bank of North America* v. *Vardon* (1790), 2 Dallas, 78.

[2] *J. Q. Adams*, I, Feb. 7, 8, 9, 13, 15, 16, 17, 22, 1804. See also *Writings of John Quincy Adams* (1914), III, letter of Adams to Peter Chardon Brooks, Jan. 21, 1804, in which he wrote as to another case argued by him at the 1804 Term, *Church* v. *Hubbart*, 2 Cranch, 187, that he had determined to engage as associate counsel, Luther Martin, "a gentleman whose professional eminence as well as his particular familiarity with causes of a commercial nature are universally recognized. . . . You are aware the customary fees of counsel here are higher than in Boston. Upon inquiry here what would be proper, I have determined to give Mr. Martin 100 dollars on employing him. I presume he will expect a further compensation should the cause come to trial."

[3] *Plumer Papers MSS*, letter of W. Plumer to Dr. John Parton, Feb. 14, 1804, letter of J. Smith, Feb. 28, 1804, in which Plumer quaintly said: "Judge Moore, from a full conviction of a speedy removal by writ of habeas corpus returnable to Heaven's Chancery, has resigned his office."

South Carolina. "The importance of filling this vacancy with a Republican and a man of sufficient talents to be useful, is obvious, but the task is difficult," wrote Albert Gallatin, his Secretary of the Treasury, on whom he greatly relied. "If taken from the Second District, Brockholst Livingston is certainly first in point of talents. If taken from the Sixth District, unless you know some proper person, inquiry will be necessary. . . . I am told that the practice is as loose in Georgia as in New England and that a real lawyer could not easily be found there. But South Carolina stands high in that respect, at least in reputation." [1] Having finally determined to select a South Carolina lawyer, Jefferson had a choice of five prominent Republicans, John Julius Pringle, Thomas Warties, William Johnson, Lewis C. Trezevant, and Theodore Gaillard, of whom he selected Johnson. At the time of his nomination, March 22, 1804, Johnson was the youngest man ever appointed on the Court, being but a little over thirty-two years of age; he had been a Judge of the State Supreme Court, and was described by a contemporary as "an excellent lawyer, prompt, eloquent, of irreproachable character, republican connections, and of good nerves in his political principles." [2] "Bold, independent, eccentric and sometimes harsh", later wrote Charles J. Ingersoll who practiced long before the Court.[3] Even

[1] *Writings of Albert Gallatin* (1879), I, letter of Feb. 15, 1804.

[2] For memorandum sent to Jefferson setting forth the characteristics of all the candidates, see *Office Seeking During Jefferson's Administration*, by Gaillard Hunt, *Amer. Hist. Rev.* (1898), III.

[3] *Historic Sketch of the Second War between the United States and Great Britain, 2d Series* (1852), I, 74, John Quincy Adams, who disliked Johnson, termed him in 1820, "a man of considerable talents, and law knowledge, but a restless, turbulent, hot-headed politician caballing Judge." *J. Q. Adams*, March 17, 1820. *Plumer Papers MSS*, letter to Jeremiah Smith, March 23, 1804; see also letter to James Sheafe, March 22, 1804, in which he terms Johnson "a man of fair moral character and not destitute of talents."

that strong Federalist, Senator William Plumer of New Hampshire, was not unfavorable to the appointment. "He is a zealous Democrat," he wrote, "but is said to be honest and capable. He has, without the aid of family, friends, or connections, by his talents and persevering industry raised himself to office."

It was after the close of this 1804 Term that William Cranch, the Chief Justice of the Circuit Court of the District of Columbia, issued the first volume of his *Reports* of the decisions in the Supreme Court. Up to that time, the opinions in the cases heard from 1801 to 1804 had been practically unknown to the Bar and to the general public, with the exception of the *Marbury Case*, a summary of which had been widely published and commented upon in the newspapers. In his preface, Cranch stated the reasons for undertaking the task, the need of dispelling the uncertainty of the law and the lack of uniformity in the decisions, when cases are unreported and suffered to be forgotten; and, he said, "in a government which is emphatically styled a government of laws, the least possible range ought to be left to the discretion of the Judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the Judge. He cannot decide a similar case differently without strong reasons, which, for his own justification, he will wish to make public. The avenues of corruption are thus obstructed and the sources of litigation closed." The publication met with favorable comment, even from political opponents.[1]

[1] A writer in the *National Intelligencer*, July 10, 1804, said: "Gentlemen of the profession throughout the United States are much indebted to the industry and learning of Mr. Cranch in preparing for their use with much labour, a volume which contains the decisions of the most important Federal tribunal in the United

Shortly before the opening of the next Term in 1805, the House of Representatives finally voted to present articles of impeachment against Judge Chase, and the following were chosen as managers for the conduct of the trial: John Randolph of Virginia, Caesar A. Rodney of Delaware, Joseph H. Nicholson of Maryland, Peter Early of Georgia, John Boyle of Kentucky, George Washington Campbell of Tennessee and Christopher Clark of Virginia.[1] The trial opened in the Senate, January 2, 1805, but was continued for a month. "I assuredly believe that the independence of the Judiciary, which is the boast of the Constitution, hangs on this pivot," wrote Simeon Baldwin.[2] On Monday, February 4 (the date of the opening of the Term of the Court) Judge Chase appeared before the Senate accompanied by his counsel, five of the most eminent Federalist lawyers — Luther Martin, Robert Goodloe Harper and Philip Barton Key of Maryland, Joseph Hopkinson of Pennsylvania and Charles Lee of Virginia.[3] Nearly a month was occupied

States. We are happy to state that these reports have been compiled with the utmost attention to accuracy and that the learned reporter will continue them under proper encouragement. . . . We feel sanguine then that this specimen may operate as an incentive to legal gentlemen in different parts of the Union towards lending their aid to similar publications. By the proper exertion in this way, we may expect to see a code of Common Law arising out of our own Constitutions, laws, customs and state of society, independent of that servile recourse to the decision of foreign Judicatures to which, since our revolution, we have been too much accustomed."

[1] It was proposed at first to impeach also District Judge Richard Peters who sat with Chase in the *Fries Case*, but it was finally decided to drop the charge against him. Peters wrote to Timothy Pickering, Jan. 11, 1804, that he was not alarmed and was entirely clear in his conscience, and he added: "I have so little an opinion of my own importance that I think they are charging a cannon to shoot a mosquito." *Pickering Papers MSS.* Jeremiah Smith wrote to William Plumer, Jan. 7, 1805, a long and witty letter as to Chase, which closed as follows: "To conclude with Prayer suitable for a Judge — from lightning and tempest, from plague, pestilence and famine, from battle (Mr. Jefferson will join me in this) and murder (and Burr in this) and from impeachment, Good Lord deliver us." *Plumer Papers MSS.*

[2] *Life and Letters of Simeon Baldwin* (1919), by Simeon E. Baldwin, letter of Jan. 5, 1805.

[3] An extremely interesting letter was written by James A. Bayard to Robert

in the presentation of the evidence and the arguments, and the Senate did little other business at this session.[1] Long before the end of the trial, predictions were freely made, even by Republicans, that owing to the inherent weakness of the case and to the great superiority of his counsel, the Judge would probably be acquitted.[2]

G. Harper, Jan. 30, 1804, advising strongly that Chase employ no counsel but conduct his own defense. *James A. Bayard Papers* (1915).

[1] See full report of the case, published in Baltimore, *Report of the Trial of the Hon. Samuel Chase* (1805). Vivid descriptions of the details of the trial and large citation of authorities are to be found in *William Plumer Papers MSS*, and in *Marshall*, III, Chap. 3. See also *Decisive Battles of the Law* (1907), by Frederick Trevor Hill; *History of the United States of America* (1889–1891), by Henry Adams; *Life of William Plumer* (1857), by William Plumer, Jr.; *Letters of Simeon Baldwin* (1919), by Simeon E. Baldwin. For other vivid contemporary accounts not cited by Beveridge, see the following newspapers: *Connecticut Courant*, Jan. 2, 16, Feb. 13, 23, 25, 27, 1805; *Baltimore Federal Gazette*, Jan. 5, Feb. 18, 23, March 4, 1805; *New York Evening Post*, Feb. 9, 14, 16, 26, 1805; *Richmond Enquirer*, March 12, 1805; *Columbian Centinel*, Jan. 17, Feb. 16, 1805; *Aurora*, Feb. 26, 27, March 1, 4, 9; *National Intelligencer*, March 1, 1805; *Independent Chronicle*, Jan. 17, 1805. Interesting glimpses of the trial are afforded in letters of John Breckenridge to his wife. *Breckenridge Papers MSS* (not cited by Beveridge). Writing, Jan. 30, 1805, he said: "There is nothing interesting here in or out of Congress. The city is said to be more insipid and dull than at former sessions. The trial of Judge Chase which is expected to come on the 4th of next month will collect a great crowd here. Much preparation is making for it. An additional gallery is erected in the Senate Chamber for the ladies, and lodgings engaged in all the boarding houses which are not full. Should the trial come on, we shall do little else this session." On Feb. 7, he wrote: "Today we met in the Senate Chamber with a view of commencing the trial of Chase. But after waiting some time and calling over the list of witnesses (40 or 50 in number) the Managers found they were not ready and the Court adjourned till tomorrow. I expect we shall then go on with it. A very great crowd attended, with more apparent anxiety in the faces of all than I ever saw exhibited. When the Senate are not in the Senate Chamber, they meet in a Committee Room which has been fixed up for them, and carry on the Legislative business. We sit in that room until 12 o'clock, and then adjourn to the Senate Chamber and open court."

[2] "Some of the democrats themselves, say the Judge will be acquitted," wrote the correspondent of the *New York Evening Post*, Feb. 26, 1805, "expressing a wish at the same time that 'the damned thing had never been meddled with.'" "The general sentiment here even among political adversaries of the Judge," wrote another, to the *Baltimore Federal Gazette*, Feb. 18, 1805, "is that he will be honorably acquitted. The candor and unsuspecting frankness of his character may have sometimes led him into indiscreet expressions and actions, but every imputation of corrupt intention is now entirely removed." "In the opinions of better judges than I am," wrote Pickering to Peters, "after a full examination of the witnesses, nothing in Judge Chase's judicial acts . . . has appeared to be a departure from strictly legal principles and rules of law. Bradley of Vermont (who tho' void of principle, sometimes dashes a correct sentiment) after hearing the greater part of the evidence, exclaimed, 'I swear if they go on much farther, they will

On March 1, 1805, when the vote was taken, Chase was found not guilty on five of the articles, and guilty (though by less than the majority required by the Constitution) on three. Of the thirty-four Senators at this time twenty-five were Republicans and nine Federalists. It required twenty-three to convict and nineteen was the highest vote obtained against Chase.

The result was hailed with jubilation by the Federalists. "It is cause for gratification to our country that on this great occasion, when all passions that could be enlisted into the partisan service were arrayed against a meritorious officer, a sense of decorum, dignity and justice has prevailed to influence the decision of our highest Court of Judicature and to repel the oppression," said one paper; and another, speaking of the "triumph of reason and justice over the spirit of party", hoped that it would have a tendency "to allay the spirit of intolerance, prejudice and party animosity which has so long disgraced our country", and it praised those Senators who had acquitted "a political opponent whom party spirit had doomed to destruction." "Let the mutual disappointment of these opinions formed by prejudice," it said, "give rise to a more tolerant and liberal spirit." [1]

The Republicans, on the other hand, received the acquittal of Chase with much bitterness of feeling.[2] "The Judge has not been found innocent," said the

prove Judge Chase an angel.' " *Peters Papers MSS*, letter of Pickering to Peters, Feb. 24, 1805.

[1] See *Columbian Centinel*, March 16, 1805; *Charleston Courier*, March 16, 19, 1805.

[2] Jefferson, it seems, had been so confident of Chase's conviction that he had even picked out Chase's successor on the Bench. *King*, V, letter of Pickering to King, March 2, 1805: "In your later letter, I think you asked me why the nomination of an Attorney General was delayed. I could not then tell; now it seems apparent. Yesterday, you will find by my letter of that date, Judge Chase was acquitted, and at the moment I began this letter, Robert Smith was nominated to be Attorney General. Had Chase been convicted on the articles of impeachment, doubtless Smith was to have been placed on the Bench."

Richmond Enquirer, he has simply escaped "through the mercy of our Constitution. To men who estimate truth by probability, Mr. Chase must appear virtually condemned; to impartial persons who resort to a much higher authority — to the merits of the prosecution itself — he must stand condemned, if not of the highest crimes and misdemeanors, at least of judicial tyranny of no ordinary standard." It said that the acquittal presented "a fruitful source of meditation and alarm" to those who believed in "a restricted but not a dependent Judiciary. If a man like Judge Chase can escape the punishment of his misdemeanors, where is the Judge who can be made to expiate his offences, in a Court of Impeachment; or what are the offences, what the judicial despotism, which can be conceived mighty enough to draw upon him the vengeance of an indignant nation?"[1] And Henry St. George Tucker of Virginia wrote to Joseph H. Nicholson: "I regard the acquittal as a foul disgrace upon our country. Is it not absurd, ridiculous that there should be any class of men in society in any office, that should be treated so much like gods, placed so far above the reach of censure and almost dignified with papal infallibility? It really seems as if the People were afraid to touch this golden calf they have formed — this talisman, the fancied charm which is to preserve us thro every danger. . . . I only wish 'twas my lot to be a Judge. As for my ignorance, that would be no cause of forfeiture, and I might play the villain when I pleased and yet be thought a perfect Daniel. Heaven forbid we should see another impeachment. It already, even in this country, deserves the title of political Impyricism."[2] The profound effect produced upon the

[1] *Richmond Enquirer*, March 12, 30, 1805.

[2] *Joseph H. Nicholson Papers MSS*, letter of March 17, 1805; *ibid.*, letter of John Randolph to Nicholson, March 9, 1805, written from his home in Virginia: "Yazoo and Chase are making a devilish noise here."

course of American legal history by the failure of the Chase impeachment can hardly be overestimated; for it is an undoubted fact that, had the effort been successful, it was the intention of the Republicans to institute impeachment proceedings against all the Judges of the Court. "Now we have caught the whale, let us have an eye to the shoal," said Jefferson, when he first learned of Chase's impeachment.[1] But the mere fact of an intention to impeach all the Judges was not the most serious feature of the situation. Its gravest aspect lay in the theory which the Republican leaders in the House had adopted, that impeachment was not a criminal proceeding but only a method of removal, the ground for which need not be a crime or misdemeanor as those terms were commonly understood. They contended that impeachment must be considered a means of keeping the Courts in reasonable harmony with the will of the Nation, as expressed through Congress and the Executive, and that a judicial decision declaring an Act of Congress unconstitutional would support an impeachment and the removal of a Judge, who thus constituted himself an instrument of opposition to the course of government. This theory, it will be seen, was the early nineteenth century form of the later twentieth century cry for recall of Judges and of judicial decisions. It is singular that the doctrine then advocated in 1805 by the most extreme of Democratic State-Rights leaders should have been reëchoed in 1912 by the most Nationalistic of Republican Ex-Presidents. Fortunately for the country, the Senate declined to adopt this view of the Constitution with relation to impeachment, though it was hotly urged by William B. Giles of Virginia, who

[1] *Baltimore Federal Gazette*, March 9. 1805. The *Independent Chronicle* of April 16, 1804, had said: "If rigid justice were laid to the line and just judgment to the plummet, Pickering and Chase would not be the only Federal Judges that might be impeached."

charged that the Judges were impeachable for their "assumption of power in issuing their process to the office of Secretary of State directing the Executive how a law of the United States should be executed, and for the right which the Courts have assumed to themselves of reviewing and passing upon the acts of the legislature." [1] Of this plan, John Quincy Adams gave a striking account in his diary: [2]

> Giles labored with excessive earnestness to convince Smith of certain principles, upon which not only Mr. Chase, but all the other Judges of the Supreme Court, excepting the one last appointed, must be impeached and removed . . . and if the Judges of the Supreme Court should dare, as they had done, to declare an Act of Congress unconstitutional, or to send a mandamus to the Secretary of State, as they had done, it was the undoubted right of the House of Representatives to impeach them, and of the Senate to remove them, for giving such opinions, however honest or sincere they may have been in entertaining them. Impeachment was not a criminal prosecution. . . . And a removal by impeachment was nothing more than a declaration by Congress to this effect: you hold dangerous opinions, and if you are suffered to carry them into effect, you will work the destruction of the Union. We want your offices for the purpose of giving them to men who will fill them better.

and writing to his father, March 8, 1805, Adams said:

> The attack by impeachment upon the Judicial Department of our National Government began two years ago, and has been conducted with great address as well as with persevering violence. . . . The assault upon Judge Chase . . . was unquestionably intended to pave the way for

[1] *Baltimore Federal Gazette*, Jan. 3, 1805, letter from Washington correspondent, Dec. 20, 1804. William Plumer wrote to T. W. Thompson, Dec. 23, 1804, as to the Giles speech: "This is the language of the dominant party and shows not only how feeble a barrier paper constitutions are against the encroachments of power, but that the boasted independency of our Judiciary exists but an idea." *Plumer Papers MSS.*

[2] *J. Q. Adams*, I, entry of Dec. 21, 1804; *J. Q. Adams Writings*, III, letters of March 8, 14, 1805.

another prosecution, which would have swept the Supreme Judicial Bench clean at a stroke. . . . When it was seen that on the very day of his (District Judge Pickering's) conviction, the impeachment of Mr. Chase was voted, and when the application of those absurd doctrines upon which he has been construed into a criminal were instantly extended to a Judge of the Supreme Court, with undisguised intimations that it would soon be spread over the whole of that Bench, some of those whose weakness had yielded to the torrent of popular prejudice in the first instance, had the integrity to reflect, rallied all their energy to assist them, and took a stand which has arrested for a time that factious impetuosity that threatens to bury all our National institutions in one common ruin.

Impeachment as a medium for attack upon the Federal Judges appearing to be a failure and, as Jefferson expressed it, "a bungling way of removing Judges", "a farce which will not be tried again", "an impracticable thing — a mere scarecrow",[1] another line of attack upon the Judiciary was now determined upon; and on the very day of Chase's acquittal, John Randolph introduced in the House of Representatives a resolution to amend the Constitution so as to provide that: "The Judges of the Supreme Court and all other Courts of the United States shall be removed from office by the President on joint address of both Houses of Congress requesting the same." Simultaneously, Nicholson introduced a Constitutional Amendment for the recall of Senators. Randolph supported his resolution by a violent speech full of heated invective against the Senate, in which he spoke of the "mockery of a trial" and the "acquitted felon." The Federalist papers were naturally highly indignant at this new move.[2]

[1] *Life of William Plumer* (1857), by W. Plumer, Jr.; *Jefferson*, XII, letter to Spencer Roane, Sept. 6, 1819.

[2] See *Charleston Courier*, March 18, 23, 1805; *Baltimore Federal Gazette*, March 9, 1805; also *ibid.*, March 12, 1805, quoting the Republican paper, the *New York Morning Chronicle; Connecticut Courant*, March 13, 1805. See also *Columbian*

"It makes every American blush for his country when so dignified and important an assembly as the House of Representatives," said a South Carolina paper, "is made the vehicle for envenomed spleen and mortified pride to vent themselves . . . and to hear the most violent and indecent invectives against a coördinate branch of the government." This proposal to subject the Federal Judges to removal by the President on a majority vote of Congress, met, however, with little approval; and even strong Republican papers stated their opposition to such an impairment of the independence of the Judiciary. "Tho' we are not friendly to the independence of judicial character which places them out of the reach of all human power, however great offences may be, we would nevertheless protest against subjecting the Judges of our tribunals to the guidance and control of every party, which may from time to time gain the ascendency in our National councils," said a Baltimore paper. "The plain objects of the resolution," said a Connecticut paper, "are to drive Judge Chase from the Bench, notwithstanding his acquittal by the Court of Impeachment; to place the Judiciary entirely at the footstool of Congress." The *Washington Federalist* said, under the headline "Blossoms of Democracy": "We do not think that the people of the United States have become so regardless of their rights, so totally indifferent to the preservation of their Constitution, as to permit its utter destruction. They cannot view these daring attempts without being alarmed; and they will not, we trust, suffer the spirit of party so far to blind them as to draw them into an acquiescence, and deceive them into an adoption of measures so utterly subversive of liberty and independence." And it again

Centinel, March 16, 1805, quoting the *New York Political Register*, as to the "indecent invective" and "hysterical whining of the malignant monkey who led the prosecution."

said: "Subject the Senate and the Judiciary to the House of Representatives, and in vain may unprotected innocence look for refuge from the oppression of power and influence. We shall soon become the ready instruments and willing slaves of a single despot. . . . If such alterations should ever be made, we may bid adieu to our Constitution and with it to our Union, liberty, and independence." [1]

Meanwhile, the pendency of the impeachment trial had not prevented Judge Chase from assuming his seat upon the Bench at this 1805 Term, though he was sharply criticized by Republican papers for this action.[2] Nor had the threats of impeachment in any way intimidated the other members of the Court or deflected them from their previous course in upholding the right of the Judiciary to determine the validity of Acts of Congress; for at this very Term, the Court in *United States* v. *Fisher*, 2 Cranch, 358, considered the constitutionality of a Federal statute giving priority to the United States in all cases of bankrupt debtors; [3] and

[1] See *Baltimore Federal Gazette*, March 8, 12, 1805. Judge Chase wrote to Rufus King, March 13, 1805, as to Randolph's measures: "I can conceive no two measures more radically destructive of our Constitution." Gouverneur Morris wrote to Uriah Tracy regarding the Randolph Amendment, Jan. 5, 1806, *Diary and Letters of Gouverneur Morris* (1898): "Since the prostration of the Judiciary, my anxiety about the Constitution is not so great as in former times. That mortal stab was but the beginning of a system — the more dangerous because it is not the result of a conspiracy among ambitious men, for that might be detected, exposed and thereby frustrated. But the mischief lies deeper, and the agents are actuated more by instinct than reflection. There is a moral tendency, and in some cases a physical disposition among the people of this country to overturn the Government."

[2] A Washington correspondent of the *Connecticut Courant*, Feb. 20, 1805, writing Feb. 6, said: "All the Judges of the Supreme Court were in their seats today. Judge Chase appears not to be anyway affected." The *Richmond Enquirer*, in an editorial, Feb. 12, 1805, severely criticized Chase for so sitting and stated that "by such conduct, Mr. Chase manifested little respect to the tribunal before whom he is impeached, to the grand inquest of the Nation, or to the sentiment of the American people."

[3] Beveridge in his *Marshall*, III, 162, describes this case as having been decided at the February, 1804, Term, but this is a mistake. See 2 Cranch, 370, note.

the general recognition of its power was interestingly shown by the fact that one of the counsel in the case, Alexander J. Dallas, the most violent Republican of all lawyers at the Bar, and Jefferson's own United States Attorney for Pennsylvania, expressly argued that: "The Constitution is the supreme law of the land and not only this Court, but every Court in the Union is bound to decide the question of constitutionality. *They are bound to decide an act to be unconstitutional, if the case is clear of doubt;* but not on the ground of inconvenience, inexpediency or impolicy. It must be a case in which the act and the Constitution are in plain conflict with each other." Chief Justice Marshall, in giving the decision of the Court, upheld the constitutionality of the statute and outlined for the first time the construction of the implied powers of the United States Government, which he was to develop more fully, fourteen years later, in *McCulloch* v. *Maryland;* and with this opinion at this early date, in 1805, the clear line was drawn between the strict and the broad constructions of the Constitution. "It would produce endless difficulties," he said, "if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. . . . Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."

While few cases of any importance were decided at the next Term in 1806, the session of the Court was marked by another attack made upon it in Congress by John Randolph, who reintroduced his Constitutional Amendment for removal of the Judges, supporting his measure by a speech in which he referred to Judge Chase as "the great culprit, whose judicial crimes or

incapacity have called for legislative punishment under the Constitution. . . . I consider the decision of the last session as having established the principle — that an officer of the United States may act in as corrupt a manner as he pleases, without there being any constitutional provision to call him to an account." Another member of the House said: "That part of the Constitution which relates to the impeachment is a nullity. . . . I do religiously believe that we cannot convict any man on an impeachment." [1] The measure again failed of adoption.

Before the opening of the next Term, Judge Paterson died on September 9, 1806, after a service of thirteen years; and President Jefferson was given a second opportunity to make an appointment on the Court. His choice fell upon Henry Brockholst Livingston of New York, whom he appointed on November 10, 1806.[2] Livingston, a cousin of Edward Livingston and of Chancellor Robert R. Livingston, was forty-nine years of age, and had been for four years a Judge of the New York Supreme Court. A few months later, Jefferson was given opportunity to make still another appointment in order to fill the additional Associate Judgeship which Congress, impelled by the increase of business and population in the Western Districts of Kentucky, Tennessee and Ohio, and by the necessity of bringing into the Court some lawyer versed in the peculiar land laws of those States, had created by the Act of February 24, 1807.[3] In appointing this Judge for this new Seventh Circuit, President Jefferson adopted the novel plan of requesting each Member of Congress from these

[1] *9th Cong., 1st Sess.*, Feb. 6, 24, 1806, 446, 499 *et seq.*

[2] Livingston's nomination was sent to the Senate, Dec. 13, and he was confirmed Dec. 17.

[3] As early as 1798, a bill passed the Senate providing for two additional Judges and Circuits in the West, but it failed in the House. See *Harry Innes Papers MSS*, letter of John Brown to Innes, June 8, 1798.

States to communicate to him a nomination of his first and second choice. After considering the names of James Hughes and John Boyle of Kentucky,[1] the Congressional caucus finally united on George W. Campbell, then a Representative from Tennessee; but since his nomination would have been in conflict with the constitutional provision against the appointment of any Member of Congress serving at the time the office was created, and since, moreover, Campbell was by no means a lawyer of the first rank (though he served with credit three years later as Secretary of the Treasury), the selection did not meet with Presidential approval. The action of the caucus was commented on by John Randolph in amusingly characteristic and caustic terms in a letter to Nicholson: "What think you of that Prince of Prigs and Puppies, G. W. C. for a Judge of the Supreme Court of the United States!!! *Risum Teneas?* You must know we have made a new Circuit consisting of the three Western States, with an additional Associate Justice. A caucus (excuse the slang of politics) was held, as I am informed, by the delegations of those States for the purpose of recommending some character to the President. Boyle was talked of, but the interest of C. finally prevailed. This is 'Tom, Dick and Harry' with a vengeance. But, to cap the climax, an attempt was made by the honorable aspirant himself so to amend the bill as to get around the constitutional barrier to his appointment. Can you conceive a more miserable or shameless prevarication than the following? An office is created, but the Act made to take effect after the 3d of March; therefore, say those unblushing quib-

[1] The statement by George Debrelle in *Great American Lawyers*, II, 232, that Jefferson offered the place to John Boyle (who was serving in Congress as Representative from Kentucky) is probably inaccurate, although Boyle would have been eminently qualified for the place. He later served as Judge and Chief Justice of the Kentucky Court of Appeals for seventeen years.

blers, not being created during the time for which we were elected, but coming into existence subsequently, we are eligible! The proposed amendment was, however, rejected, altho strenuously pressed in the House as well as in the Committee." [1] Finally Jefferson decided upon the appointment of a Kentucky lawyer who had the singular distinction of being either first or second choice of every member of Congress from the States interested — Thomas Todd. Todd, whose nomination was made on February 28, 1807, was forty-one years old, had been for five years a member of the Court of Appeals of Kentucky and was then Chief Justice. He served on the Supreme Court for twenty years, dying in 1826, worn out by the strain of sitting twice a year on Circuit in the three distant Western States and once a year at Washington. In an obituary notice, Judge Story wrote that it was to Todd's honor "that though bred in a different political school from that of the Chief Justice, he never failed to sustain those great principles of constitutional law on which the security of the Union depends. He never gave up to party what he thought belonged to the country."

During the year 1807, Republican hostility towards the Court and towards Marshall personally was brought to a climax by the decisions of the Chief Justice in two cases connected with the Aaron Burr conspiracy, *Ex Parte Bollman*, 4 Cranch, 75, in the Supreme Court, and *United States* v. *Burr*, in the Circuit Court in Virginia. During the fall of 1806, the Administration had been much perturbed over the mysterious actions of Burr and certain of his associates. Jefferson believed, and there was apparent evidence to support the belief, that Burr was planning an expedition to precipi-

[1] *Joseph H. Nicholson Papers MSS*, letter of Randolph to Nicholson on Feb. 17, 1807; see partial quotation in *John Randolph* (1882), by Henry Adams.

tate a war with Spain and to set up a separate government in the Western States, which already had grievances against that country because of the restrictions on commerce on the Mississippi imposed by Spain prior to the Louisiana purchase. "Our Catiline is at the head of an armed body," wrote Jefferson, "and his object is to seize New Orleans, from there attack Mexico, place himself on the throne of the Montezumas, add Louisiana to his empire and the Western States from the Alleghany, if he can. I do not believe he will attain the crown but neither am I certain the halter will get its due." [1] Whether Burr was planning treason or merely a violation of our neutrality laws has never been clearly established. Jefferson, however, was convinced that it was treason, and he took radical measures accordingly. In New Orleans, General Wilkinson, having declared martial law, arrested two alleged accomplices of Burr, Erich Bollman and Samuel Swartwout, and disregarding a writ of habeas corpus issued from the Supreme Court of New Orleans Territory, sent the prisoners under military guard to Charleston. From that place they were sent on to Washington, in direct disobedience to another writ of habeas corpus issued by the United States District Court. At Washington, they were kept under military arrest, while steps were taken for their commitment on a charge of treason. Before actual commitment and before an attempt could be made to secure release from arrest by habeas corpus, Jefferson asked Congress, on January 23, 1807, to authorize him to suspend the privilege of the writ of habeas corpus. On the same day, the Senate sitting with closed doors actually passed a bill suspending the writ for three months "in all cases of treason, misprision of trea-

[1] *Works of Thomas Jefferson* (ed. by A. G. Lipscomb, 1903), XIX, letter to John Langdon, Dec. 22, 1806. See also *Jefferson*, X, letter to Caesar A. Rodney, Dec. 5, 1806.

son, or other high crime or misdemeanour endangering the peace, safety or neutrality of the United States, in case of arrest by virtue of warrant or authority from the President or Governor of any State or Territory, or person acting under direction or authority of the President." This very radical measure aroused loud outcry throughout the country, and after hot opposition by the Federalists, it was finally defeated in the House by a large majority.[1] While the bill was still pending, the Circuit Court of the District of Columbia ordered the commitment of Bollman and Swartwout for treason, although Judge William Cranch dissented in a noble opinion in which he voiced his sentiments as to the policy which must control the Courts in times of grave political excitement. "In times like these," he said, "when the public mind is agitated, when wars and rumors of wars, plots, conspiracies and treasons excite alarm, it is the duty of a Court to be particularly watchful lest the public feeling should reach the seat of justice, and thereby precedents be established which may become the ready tools of faction in times more disastrous. . . . Dangerous precedents occur in dangerous times. It then becomes the duty of the Judiciary calmly to poise the scales of justice, unmoved by the armed power, undisturbed by the clamor of the multitude." And in a striking letter to his father, Judge Cranch (then only thirty-eight years old) voiced his views as to the obligation of the Judiciary to withstand Executive power and popular clamor, as follows :[2]

[1] See *Columbian Centinel*, Feb. 4, 7, 11, 1807. Rufus King wrote: "How the Senate could have passed an act which would have permitted such deeds of tyranny is strange and incomprehensible. That body, with all its weakness, meanness, and subserviency, contains men devoted to the freedom of their country, and worthy of its highest confidence. The bill failed in the House of Representatives, who in checking this act of tyranny have atoned for much imbecility and folly that had before been exhibited." *King*, IV, 544, 547.

[2] *Greenleaf and Law in the Federal City* (1901), by Allen C. Clark, 53, letter of Cranch, Feb. 2, 1807.

Never in my life have I been more anxious. You will see by the newspapers that I have dared to differ from my brothers on the Bench. I have dared to set the law and the Constitution in opposition to the arm of Executive power, supported by the popular clamor. I have dared to attempt to maintain principle at the expense of popularity. . . . In my own mind, I had no doubt whatever that the Constitution did not justify a commitment upon such evidence; and although I felt that the public interest might be benefitted by committing those gentlemen for trial, yet I could not consent to sacrifice the most important constitutional provision in favor of individual liberty, to reasons of State. I was not willing that the Executive department should transfer to us its own proper responsibility. Never before has this country, since the Revolution, witnessed so gross a violation of personal liberty, as to seize a man without any warrant or lawful authority whatever, and send him two thousand miles by water for his trial out of the district or State in which the crime was committed — and then for the first time to apply for a warrant to arrest him, grounded on written affidavits. . . . So anxious was the President to have this prosecution commenced, or, to use his own language, to deliver them up to the civil authority, that he came to the Capitol on the day of their arrival, and with his own hand delivered to the District Attorney, Mr. Jones, the affidavits of General Wilkinson, and instructed the Attorney to demand of the Court a warrant for the arrest. . . . When this circumstance is considered — and the attempt made in the Legislature to suspend the privilege of habeas corpus . . . when we reflect on the extraordinary exertions made by all under Presidential influence to exaggerate Burr's conspiracy into a horrid rebellion, so that the Administration may have the merit of quelling it without bloodshed — when they have so far succeeded as to excite the public mind almost to frenzy in many parts of the country — you may form some idea of the anxiety which has attended my dissent from the majority of the Court. But having no doubt as to my duty, I have never once thought of shrinking from my responsibility.[1]

[1] The fact that Judge Cranch was a staunch Federalist, appointed by Adams, may have colored his language, but his dissent was clearly justifiable, as a matter of law.

There were even Republicans who were disturbed at the extreme measures taken by the Administration; and James Hughes of Kentucky wrote: "The agitation occasioned by Burr's conspiracy and the sending round these men for trial has produced some very tory-fied doctrines from well meaning men — such as that the President's message, or proclamation, is evidence of the actual existence of a rebellion. It not infrequently happens that, transported by the indignation arising from an attempt to destroy a free Government, its friends, by the measures they take to defend and support it, sap those principles on which it is founded."[1] Bollman and Swartwout at once applied to the Supreme Court for a writ of habeas corpus, and on February 10, Charles Lee of Virginia argued the motion briefly, evidently supposing there would be no difficulty as to the issue of the writ. Attorney-General Rodney said that "it was not his wish in this stage of the business to make any remarks. If it should be the determination of the Court to issue a writ of habeas corpus, he would cheerfully submit to it."[2] On February 11, Robert G. Harper of Maryland, one of the leading Federalists of the day, stated that he and Luther Martin wished to be

[1] *Harry Innes Papers MSS*, letter of Hughes to Innes, Feb. 8, 1807. It had been generally expected that Hughes would receive the new appointment to the Court; see *ibid.*, letter of B. Thurston, Feb. 18, 1807. John Randolph wrote to Nicholson, Feb. 5, 1807: "It strikes me that whenever government comes into Court demanding justice to be done upon an individual, it should come with clean hands; at least, that they should be unstained with oppression, committed upon the person of him whom they have dragged to the bar of criminal justice. This business of seizing the person of the citizen with the strong hand of military power, while the other twin member of the civil arm (all the while no doubt unconscious of the outrage) is ready to receive him, is a circumstance that I do not understand and which strikes me with consternation." *Joseph H. Nicholson Papers MSS.* John Quincy Adams, writing January 30, said that the case "excites universal curiosity, so that we are scarcely able here (in the Senate) to form a quorum to do business, and the House of Representatives actually adjourned for want of a quorum."

[2] This is quoted from the *National Intelligencer*, Feb. 11, 1807, which in its various issues contains a fuller report and more details of the argument of the case than appear in 4 Cranch, 75.

heard for Bollman, "induced to make this request from understanding that the Court had some difficulty on certain points which had not been so fully examined by Mr. Lee as their importance merited." Accordingly, Harper argued at length, on February 12, the question whether the Supreme Court had any power under the Constitution to issue a writ of habeas corpus, and he alluded to the political prosecution as follows: "Let it be once established by the authority of this Court, that a commitment on record by such a tribunal is to stop the course of the writ of habeas corpus, is to shut the mouth of the Supreme Court, and see how ready, how terrible an engine of oppression is placed in the hands of a dominant party, flushed with victory, and irritated by a recent conflict; or struggling to keep down an opposing party which it hates and fears. Does the history of the human passions warrant the conclusion, or the expectation, that such an engine will not be used?" Meanwhile, President Jefferson was closely watching the proceedings, anxious to see whether Marshall would again put obstacles in the path of the Executive. Two days later, the Chief Justice announced the opinion of four Judges, a majority of the Court, upholding its power to issue the writ. Judge Johnson who dissented (Chase agreeing with him and Cushing being absent from illness) referred caustically to Harper's "popular observations on the necessity of protecting the citizen from Executive oppression", and to his "animated address calculated to enlist the passions or prejudices of an audience." On February 18, Bollman and Swartwout were actually brought in person before the bar of the Court, and arguments lasting three days were made by Francis Scott Key, Harper and Martin against the Attorney-General and the District Attorney Walter Jones, on the question whether there was evidence

of acts of treason sufficient to warrant the commitment. The day after the close of the arguments, the Court stated that it "had not yet been able to make up a decisive opinion; in the meantime, as the situation of the prisoners might be irksome to them, if they could find bail, they might be bailed until tomorrow." Alarmed at what they considered signs of Marshall's intention to release the prisoners, the Jeffersonians in Congress now introduced a resolution to curb the power of the Court to issue habeas corpus. To this move, however, the Federalists rightly objected that Congress had no authority to suspend or divest the jurisdiction of the Supreme Court, conferred by the Constitution; and the plan was defeated.[1] Two days later, on February 21, Chief Justice Marshall rendered the opinion of the majority of the Court, elaborately considering the definition of the crime of treason, and holding that there was not sufficient evidence of a levying of war to justify the commitment of the prisoners for treason, and the unanimous opinion of the Court that the crime, if any, not being committed in the District could not be tried there; on several other questions which had arisen the Court (consisting of four Judges — Livingston, Chase and Cushing being absent) were evenly divided.[2] By President Jefferson, the decision was viewed as another deliberate attack by the Court upon his Executive authority. The Federalists, on the other hand, regarded it as a noble example of the judicial safeguards to individual liberty. "It

[1] *National Intelligencer*, Feb. 16, 17, 20, 1807; *9th Cong., 2d Sess.*, Feb. 17, 19, 1807.

[2] *National Intelligencer*, Feb. 23, 1807; *Columbian Centinel*, March 4, 1807. A division of the Court had been interestingly predicted by a Washington correspondent of the *New York Evening Post*, Feb. 20, the day before the decision: "All the Judges are clear that there is no ground for a charge of treason. One is for committing them for a smaller offence, two for discharging them. One is doubtful. This I am assured of from sources which preclude any doubt of the fact." See *ibid.*, Feb. 26, 1807.

happened, from a singular and unforeseen coincidence of strange circumstances, that I should be the first to resist the hand of arbitrary power, and to stem the torrent, which has at length yielded and is now turning the other way," wrote Judge William Cranch on the day of the decision. "Although I have not for a moment doubted the correctness of my opinion, yet it is a source of great satisfaction to find it confirmed by the highest judicial tribunal in the Nation. I congratulate my country upon this triumph of reason and law over popular passion and injustice — upon the final triumph of civil over the military authority, and of the practical principles of substantial personal liberty over the theoretical doctrine of philosophic civil liberty." So exasperated were the adherents of Jefferson over the release of the prisoners accomplished by this decision that suggestions were made of impeachment of the Judges, and even of Amendments to the Constitution depriving the Court of all jurisdiction in criminal cases ; and these threats took concrete form, the next year, when on motion of William B. Giles of Virginia, a bill was reported in the Senate to abolish the power of the Court to issue writs of habeas corpus. Meanwhile, Jefferson's suspicions of the Chief Justice and his apprehensions as to the effect of his construction of the law of treason in the *Swartwout Case* were heightened and confirmed by Marshall's course in the trial of the main offender, Burr, which took place after the Court adjourned. On March 30, 1807, when Burr was brought before the Chief Justice sitting in the Circuit Court in Richmond, after hearing the evidence produced, Marshall declined to hold Burr for treason but bound him over to the grand jury for a violation of the neutrality law. "The Federalists make Burr's cause their own, and exert their whole influence to

shield him from punishment," wrote Jefferson. "And it is unfortunate that Federalism is still pre-dominant in our Judiciary department, which is consequently in opposition to the Legislative and Executive branches and is able to baffle their measures often."[1] On June 24, the grand jury, of which John Randolph was foreman, found indictments against Burr both for treason and misdemeanour.[2] The trial began on August 17, and ended with Burr's acquittal on September 3. It was remarkable for the asperity with which it was conducted on both sides, and for the virulence with which the Republican newspapers assailed Burr, his counsel and the Court, as well as for the equally savage onslaughts of the Federalist organs upon "the sanguinary doctrines of the Jeffersonian legal myrmidons", "the persecution of Burr", "the improper and flagitious conduct of the Government", "the Democratick prints in their rage for the blood of Burr . . . crying 'down the Court.'"[3] The famous ruling of Chief Justice Marshall as to the sufficiency of the evidence to constitute the crime of treason — a ruling which clearly defined the legal elements of the crime and the necessity of proving an overt act of levying war by Burr in Virginia — was greeted with a burst of fury by the Republican press. "Now may the ensign of rebellion be once more unfurled, and *all* may hurry to its standard, fearless of punishment," said the *New York Daily Advertiser*. "Treason may again shadow with dismal pomp the Western States, and ambitious men may find fit opportunity for the

[1] *Jefferson*, X, letter to James Bowdoin, April 2, 1807.

[2] For description of the details of the trial, see *Marshall*, III, Chapters 6–9; *Wirt*, II; *Trial of Aaron Burr*, by James A. Cabell, *New York State Bar Ass.*, XXIII; *Decisive Battles of the Law* (1907), by Frederick Trevor Hill.

[3] See *Columbian Centinel*, May 9, 1807; *United States Gazette*, quoted in the *Aurora*, June 12, 1807, and in the *New York Evening Post*, Aug. 21, 1807. See *Aurora*, June 11, 16, 18, 23, 25, 1807; *Independent Chronicle*, June 29, Sept. 7, 1807.

advancement of their own designs. Justice, whose hand should be swift and unerring, has become vapid and inert. . . . A retrospect of the conduct of Judge Marshall in this case conveys no pleasing reflections and affords sufficient grounds for animadversion." And the *Aurora*, terming the decision "extraordinary", said that "after the countenance which treason and traitors have experienced in Courts instituted for the public safety and for the ends of justice only, the people now have to consider whether the existing Judiciary system and the English common law are exactly calculated for a free nation and a virtuous people." And for over six months, the Republican papers of Richmond, Baltimore, Philadelphia, New York and Boston continued to attack the conduct of "the farce at Richmond" in which a Chief Justice had been "conniving at the escape of the traitor", and had been "accused by the Executive of maladministration of the law." [1]

The Federalist papers, on the other hand, regarded Marshall's ruling as proof of the scrupulous care with which this trial of a man for his life was conducted by the presiding Judge — an honorable example of the Anglo-Saxon methods of criminal prosecution which do not relax the safeguards to the right of the accused,

[1] *New York Daily Advertiser*, Sept. 1807; *Aurora*, Sept. 11, 1807, Feb. 9, 1808. See also "Letters to John Marshall", by Lucius (William Thompson), first printed in the *Aurora*, and the *Richmond Enquirer*.

William Wirt wrote to Dabney Carr, Sept. 1, 1807: "Marshall has stepped in between Burr and death. He has pronounced an opinion that our evidence is irrelevant, Burr not having been present at the island with the assemblage, and the act itself not amounting to levying war." On Sept. 8, he wrote: "You will see the opinion by which Marshall stopped the trial for treason. The trial for misdemeanour will begin today. It will soon be stopped." On Sept. 14, he wrote: "The second prosecution of Burr is at an end; Marshall has again arrested the evidence." That Wirt, however, was not too prejudiced to have a full appreciation of Marshall's intellectual eminence was shown by a letter to Benjamin Edmonds, Dec. 22, 1809, in which he said: "This power of analysis, the power of simplifying a complex subject and showing all its parts clearly and distinctly is the forte of Chief Justice Marshall." *Wirt*, I.

even in times of high political agitation.[1] "The dignified independence which has characterized the Court sitting at Richmond has reflected high honor on the jurisprudence of our country," said a Boston paper; while a Virginia paper characterized the attitude which all patriotic citizens demanded from the Courts, and which it found in Marshall's judicial conduct, as follows: "If Burr's crimes were ten times greater than the bitterest of his enemies allege, we hope he will only suffer as the law directs. If once the law is subservient to motives of policy, or what is worse, to suit the views of party, we may bid a long farewell to all our boasted freedom. . . . The Judge does not make the laws, he expounds them, and is bound to see that the trial be conducted according to law; such, we believe, has been the conduct of the Court on the present occasion, and such we hope it will ever be. The Judge who permits the reasons of State or popular opinions to influence his judgment would be a fit member for a Star Chamber Court or a revolutionary tribunal, but is wholly unqualified for a Judge in a Court which has been established by the Constitution and laws of a free and independent Nation."

The proceedings at the trial and Marshall's rulings had been followed with close anxiety by Jefferson, and frequent instructions had been sent by him to the United States Attorney George Hay. The motion made by Burr's counsel for the issue of a subpoena to Jefferson for the production of certain papers and Marshall's action in regard to it had angered the President, and seemed to deepen his conviction that the Chief Justice was intending to enhance the powers of the Judiciary

[1] *Columbian Centinel*, Sept. 19, 1807; *Norfolk* (Va.) *Ledger* quoted in *Charleston Courier*, Oct. 1, 1807. Marshall wrote to Peters, Nov. 23, 1807: "I might perhaps have made it less serious to myself by obeying the public will instead of the public law." *Peters Papers MSS.*

at the expense of the Executive. Very early, he had expressed his view to Giles that "all the principles of law are to be perverted which would bear on the principal offenders who endeavor to overrun this odious Republic," and he clearly stated that a Constitutional Amendment would be necessary to curb the Judges: "The Nation will judge both the offender and Judges for themselves. If a member of the Executive or Legislature does wrong, the day is never far distant when the people will remove him. They will see them and amend the error in our Constitution, which makes any branch independent of the Nation. They will see that one of the great coördinate branches of the Government, setting itself in opposition to the other two, and to the common sense of the Nation, proclaims impunity to that class of offenders which endeavors to overturn the Constitution, and are themselves protected in it by the Constitution itself; for impeachment is a farce which will not be tried again. If their protection of Burr produces this Amendment, it will do more good than his condemnation would have done." To others of his friends, Jefferson expressed his resentment as to the outcome of the trial, writing to one that: "The scenes which have been acting at Richmond are sufficient to fill us with alarm. We had supposed we possessed fixed laws to guard us equally against treason and oppression. But it now appears we have no law but the will of the Judge. Never will chicanery have a more difficult task than has been now accomplished to warp the text of the law to the will of him who is to construe it," and to another, he characterized "the scenes which have been enacted at Richmond" as "such as have never before been exhibited in any country where all regard to public character has not been yet thrown off. They are equivalent to a proclamation of impunity to

every traitorous combination which may be formed to destroy the Union. However, they will produce an Amendment to the Constitution which, keeping the Judges independent of the Executive, will not leave them so of the Nation." [1]

The "unusual fermentation" into which the public mind had been thrown "by the conduct of John Marshall" and the "resentment and indignation which his conduct had excited" (as expressed by the *Aurora*) took definite form, two months after the trial, when the Republicans introduced into Congress a resolution for a Constitutional Amendment providing for a limited term of office for Federal Judges and for their removal by the President on address of two thirds of each House; [2] and again in 1808, the conduct of the Burr trial and of the Federal Judiciary became the subject of criticism voiced in forcible terms. In a report filed by John Quincy Adams for a special Senate Committee on the question of the expulsion of Senator John Smith for alleged connection with the Burr conspiracy, the rulings of the Chief Justice were hotly assailed and the possibility of impeachment intimated.[3] And in a de-

[1] *Jefferson*, X, letters to W. B. Giles, April 20, 1807, to William Thompson, Sept. 26, 1807, and to James Wilkins, Sept. 20, 1807.

[2] See *Aurora*, March 17, 19, 22, 24, 1808, advocating this judicial reform, which was pressed again in Congress in 1808, 1811, and 1812, by Amendments introduced in the House by Republicans, calling for removal on address by a majority of the members of each House. In 1816, a similar amendment was introduced in the Senate, in the debate on which Senator Sanford of New York said that the Judges were now "placed on an eminence more exalted than was consistent with the genius of our Government or the extent of the Constitution." *10th Cong., 1st Sess.*, Nov. 5, 1807, 21, Feb. 22, 1808, 133; *12th Cong., 1st Sess.*, April 13, 1812, 317; *14th Cong., 1st Sess.*, March 18, 1816.

[3] *10th Cong., 1st Sess.*, 56–63, Feb. 24, 1808; *J. Q. Adams Writings*, III, 730–844; *Marshall*, III, 541, 544. Writing of this report, Timothy Pickering said, Jan. 2, 1808: "Who that knows and respects the eminent abilities, the unsullied integrity, the great legal knowledge and the most amiable character of Chief Justice Marshall will not resent the unwarrantable insinuations that in the trial of Burr he 'abused the benignity of general maxims'; 'withheld from the jury testimony sufficient for his conviction'; and that 'in consequence of this suppression of evidence' Burr was acquitted? Again, both the law and the Judge are assailed. The Judge is represented as having aimed to exclude from the mind of the jury

bate on a bill to amend the law of treason, reported by Giles at Jefferson's request,[1] John Pope of Kentucky stated that: "The Federal Judiciary is, to the people I represent, the most odious feature of the Government. It has been already very inconvenient and oppressive to them, and would have been much more so, but for some later decisions of the Supreme Court of the United States. These decisions have very much lessened the evil. . . . My reflections have convinced me that we must, as far as the Constitution will authorize, restrain the consolidating principle. This Government should interfere as little as possible with the interior of the States." Giles himself made a savage attack upon Marshall, without, however, specifically naming him; he contrasted the "honorable and dignified character of an independent Judge" with "a Judge who, forgetting the nature of his office, is perpetually aspiring not only to render his department absolutely independent, but to render it supreme over all other departments of the Government . . . reduced to the miserable political intriguer, scrambling for power." Of Giles' speech, Joseph Story of Massachusetts, who was then visiting Washington, wrote in picturesque fashion: "Never did I hear such all-unhinging and terrible doctrine. He laid the axe at the root of judicial power, and every stroke might be distinctly felt. . . . One of its objects was to prove the right of the Legislature to define

'by the curtain of artificial rules what the subtlest understanding cannot disguise, crimes before which ordinary treason whiten into virtue.'" *Pickering Papers MSS.* See also *Peters Papers MSS*, letter of Jan. 8, 1808, as to Adams' "vehemence and precipitation of character and obliquity of mind." John Randolph in a debate in the House, Feb. 1, 1828, *20th Cong., 1st Sess.*, attacked Adams "who attempted to libel the present Chief Justice and procure his impeachment, making the seat of John Smith of Ohio the peg to hang the impeachment on." For an encomium on the report, see *National Aegis*, Jan. 13, 1808.

[1] Pickering wrote to King, Feb. 24, 1808: "There is much opposition to Giles' treason bill . . . but as it is a Presidential measure, it may pass, tho the appearances at this time are against it. All the distinguished Philadelphia lawyers who have been down here reprobate it in strong terms."

treason. My dear friend, look at the Constitution of the United States, and see if any such construction can possibly be allowed. I heard him with cool, deliberate attention; and I thought that he could be answered with triumphant force. He attacked Chief Justice Marshall with insidious warmth. Among other things he said: 'I have learned that judicial opinions on this subject are like changeable silks, which vary their colors as they are held up in political sunshine.' " [1]

Though the Giles bill was defeated, the relation of Marshall to the Burr trial long continued to rankle in the Republican mind; and while the Federalist view of Marshall's conduct has been largely accepted by historians, it must be admitted that the belief held by Jefferson and his followers that Marshall had been influenced by personal and partisan feeling in some of his rulings had considerable justification.[2] It is a remarkable tribute to his integrity, however, that criticism of this nature was never leveled against Marshall in any other case, either during his lifetime or in the years immediately succeeding his death.[3]

[1] *Story*, I, 157, letter of Feb. 13, 1808.

[2] See *John Marshall and the Constitution* (1920), by Edward S. Corwin; Prof. Andrew C. McLaughlin in *Amer. Bar Ass. Journ.* (1921), VII, 233, said: "Marshall's law may have been good; but a critical examination may lead the trained lawyer to agree with Corwin that the case is a blemish on Marshall's career." As to Marshall's conduct in the *Burr Case*, see Harlan, J., in *Sparf* v. *United States*, 156 U. S. 51, 68.

[3] Reverdy Johnson, a strong Democrat, in a speech in the Senate, May 10, 12, 1848 (*30th Cong., 1st Sess.*), spoke of Marshall "whose honesty, except in the very excess of political madness, was never questioned but once, and in that instance only by Mr. Jefferson and that on account of the burning desire he felt to punish Aaron Burr."

NOTE. Jefferson wrote to James Bowdoin, Jr., April 2, 1807: "The fact is that the Federalists make Burr's cause their own, and exert their whole influence to shield him from punishment. . . . It is unfortunate that Federalism is still predominant in our Judiciary Department, which is consequently in opposition to the Legislative and Executive branches and is able to baffle their measures often." *Temple-Bowdoin Papers, Mass. Hist. Soc. Coll.*

CHAPTER SEVEN

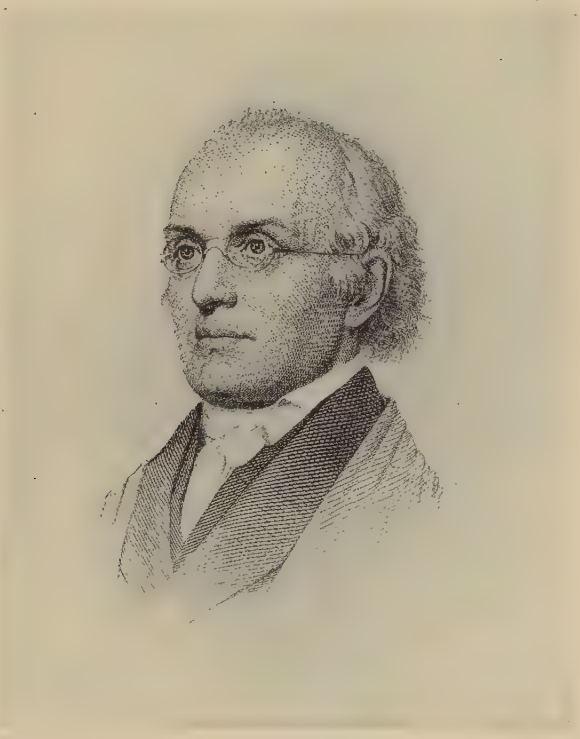
JUDGE JOHNSON AND THE EMBARGO

1808

Republican anger over Marshall's part in the Burr trial lasted for many months and was voiced not only in the newspapers but in the formal toasts, which were the usual accompaniment of all celebrations in those days and of which the following are illustrative. "The Judiciary when they Marshall themselves on the side of treason, in opposition to law, justice and humanity, may they hear 'the small still voice' of the Nation ordering them from their unhallowed seats into eternal political oblivion," was a toast of the Washington Fusileers. "Choice Spirits — Pickering, Marshall and Burr. If raised above the 'dull pursuits of civil life' may it be done by impartially administering to them the justice due from their country," was given at a Republican meeting in Connecticut, of which a Federalist paper said with indignation: "The Chief Justice of the United States and a member of the Senate of the United States are associated with a murderer and a traitor, a wretch abandoned of his country and his God, and crucified with him in anticipation on the same tree. Look at the bloody annals of the French Revolution and you will find the diabolical spirit which dictated this toast — a spirit which seems indeed to have made an alarming progress in this country." [1]

Convening for its session in 1808 amid such an atmos-

[1] *Aurora*, July 11, 1808; *New York Commercial Advertiser*, Aug. 4, 1808.



JOSEPH STORY

phere of hostility on the part of the Administration's followers, there can be little doubt that the Court did not welcome the fact that one of the first and most important cases which it was called upon to decide presented a question, the decision of which seemed likely to place it in conflict with one of the leading political contentions of the Administration. For several years, the impressment of American seamen and especially of naturalized Americans by the British had been one of the chief causes of friction in the international relations of this country. England maintained with vigor that, as under its common law no British citizen could voluntarily expatriate himself, it had a right to take off of American ships any former British citizen, even though he were naturalized in the United States. Less than a year before, in June, 1807, the outrageous attack of the British frigate *Leopard* on the *Chesapeake* had raised the issue in its most serious concrete form. The President and the State Department had for many years stoutly denied the British contention, both as matter of law and matter of right. Yet as early as 1799, Chief Justice Ellsworth, in the case of Isaac Williams in the Circuit Court, had upheld the English law as to expatriation. The question had arisen in several cases in the Supreme Court, but a decision on the point had never been squarely made. In *McIlvaine* v. *Coxe's Lessee*, 2 Cranch, 280, 4 Cranch, 209, it was now presented in a case involving the right of a native of New Jersey, who had become a loyalist refugee after 1776, to inherit land in that State. The case had been first argued in 1805, by William Tilghman and Jared Ingersoll for the right of expatriation against William Rawle and Richard Stockton. "The doctrines advanced upon the present occasion," said Ingersoll,

"are to me, novel, strange and alarming. . . . That the French who aided us are called aliens, while the British loyalist refugees may hold lands as a citizen, is a language I do not understand. If the law is so, it is strange, and I must abandon an idea I have always cherished, that the rules of law were founded in sound sense." No decision was reached in 1805, as only four Judges were sitting (Cushing, Paterson, Washington and Johnson), Marshall having been interested in the point involved as counsel in another case, and Chase being engaged in his impeachment trial. Later, after Paterson's death and the accession to the Bench of Judges Livingston and Todd, it was reargued, in 1807, by Peter S. Duponceau and Jared Ingersoll against William Rawle and Edward Tilghman, before Chase, Washington, Johnson and Livingston (Marshall and Cushing being absent). Over a year later, in 1808, the Court decided through Judge Cushing (Johnson, Todd and Marshall taking no part in the decision) that by the express provisions of the New Jersey statute Coxe was a citizen of that State in 1776, and was by force of that law "incapable of throwing off his allegiance to that State." By declining to express an opinion "upon the right of expatriation as founded on the common law", and by thus resting its decision on the fact that "the Legislature of that State by the most unequivocal declarations asserted its right to the allegiance of such of its citizens as had left the State", the Court saved itself from being placed in the awkward position of upholding a doctrine which the Executive authorities of the country were warmly denying in their diplomatic correspondence with England.[1]

[1] The authority of this case was much weakened twenty-two years later by the decisions in the famous cases of *Inglis* v. *Sailor's Snug Harbour*, 3 Pet. 99, argued by David B. Ogden and Daniel Webster against William Wirt and Samuel Tal-

In another class of cases at this 1808 Term, the Court was not so successful in escaping a conflict with the sentiment of the Administration and of the political party then in power. The numerous captures of American ships by French and British privateers, under Napoleon's arbitrary and illegal Berlin and Milan decrees and under the equally arbitrary and illegal British Orders in Council, had presented the question whether the American Courts should follow the British doctrine as to conclusiveness of the decisions of foreign Prize Courts.[1] In *Croudson* v. *Leonard*, 4 Cranch, 434, in which an American ship had been captured by the British and condemned by a British Prize Court for attempting to break the blockade, the company in which the ship was insured contended that the assured could not recover, since he was bound by the finding by the British Court as to unneutral behavior; the assured contended that, in view of the irregular and unjust decisions of both British and French Courts, an American Court ought not to follow the rigid British rule, and that it ought

cott, and *Shanks* v. *Dupont*, 3 Pet. 242, argued by William Wirt and Cruger against Hugh Légaré. See *Treatise on Expatriation* (1814), by George Hay; *Review of a Treatise on Expatriation* (1814), by John Lowell; *The Right of Expatriation, Amer. Law Rev.* (1877), XI, 477; *The Right of the American Citizen to Expatriate*, by G. B. Slaymaker, *ibid.* (1903), XXXVII; *Expatriation, Law Reporter* (1859), XXII.

[1] In a *Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States* (1824), by Peter S. Duponceau, 124, it was termed a doctrine of injustice "fatal to our neutral interests — which was not finally settled even in England until a case in the House of Lords in 1803 (*Lothian* v. *Henderson*, 3 Bos. & Pull, 499) and much discussed and denied in the United States by Judge Livingston, Judge Cooper, DeWitt Clinton, and Alexander J. Dallas."

In 1802, a decision of the highest Court of New York in *Vandenheuvel* v. *United Ins. Co.* holding a foreign Court decree not conclusive was highly praised by the New York papers, which stated that it was "highly impolitic in a neutral nation to admit foreign admiralty decisions as conclusive; opposed to the best interests of commerce, contrary to the spirit and nature of an insurance, and destructive of all substantial justice between our own citizens." See *Salem Register*, March 4, 1802.

Jefferson wrote to Gallatin, July 12, 1803: "Every attempt of Great Britain to enforce her principle of, 'once a subject and always a subject,' beyond the case of her own subjects, ought to be repelled." *Jefferson*, X.

to allow an assured to introduce proof that he had violated no well-established law of neutrality. Judge Washington, however (Marshall, Johnson and Cushing concurring, and Livingston and Chase dissenting), held that the British rule must be followed, and that "if the injustice of the belligerent powers and of their Courts should render this rule oppressive to the citizens of neutral nations, . . . let the government in its wisdom adopt the proper means to remedy the mischief." This decision, adopting an English doctrine of law resulting in great advantage to England, and made at the very time when the Administration was attacking England by means of Embargo and Non-intercourse Laws, was deeply resented by the Republicans.[1] Two other cases at this 1808 Term, *Rose* v. *Himely*, 4 Cranch, 241, and *Hudson* v. *Guestier*, 4 Cranch, 293, involving unjustifiable acts of French privateers, may be noted because of the length of time occupied in argument, nine days, and the number of eminent counsel engaged — Charles Lee, Robert G. Harper, Alexander J. Dallas, William Rawle, Jared Ingersoll, Jr., John Drayton and Samuel Chase, Jr., against Peter S. Duponceau, Edward Tilghman, and Luther Martin.[2]

After the Court adjourned in March, 1808, its Judges were now brought into contact with a serious situation in the country which called upon the Court, as soon as it should next convene, to exercise its greatest function under the Constitution, that of composing the discordant elements in the framework of the new Government and promoting the National Union.

[1] *Madison*, VII, see letter of Madison to Jefferson, June 22, 1810, referring to the case of *Dempsey* v. *The Insurance Company of Pennsylvania* (argued in 1807 and 1808 and discussed in *Calhoun* v. *The Insurance Company of Pennsylvania*, 1 Binney, 293) and saying: "It is a most thorough and irrefragable disproof of the British doctrine on the subject as adopted by a decision of the Supreme Court."

[2] *Story*, I, 161, 165, letters of Feb. 16, 25, 1808.

For some years, there had been a distinct tendency in the Northern States to give more and more consideration to the possibility of the dissolution of the Union and the establishment of a Northern Confederacy. Four factors had been prominent in developing this sentiment. In the first place, the Federalists of the North were devoted partisans of Great Britain, and Jefferson's hostility to that nation and his partiality for France had always aroused their grave apprehensions lest he might force the country into war.[1] In the next place, the Federalists regarded Jefferson's annexation of Louisiana as an unconstitutional act which was bound to prove ruinous to their interests. As has been well said: "Jefferson was a democrat, a people's man upon conviction, genuinely and with a certain touch of passion; but he was no lawyer. He stickled for a strict construction of the Constitution only when he thought that a strict construction would safeguard the rights of common men and keep the Federalist theories of government at arm's length: not because he disliked to see the country have power as a Nation, but because he dreaded to see it put in bondage to an autocratic government. He wanted as little governing from the Federal Capital as might be, but as much progress as might be, too. . . . It was his weakness to think it safe for the friends of the People to make a 'blank paper' of the Constitution, but the very gate of revolution for those

[1] The extent of Massachusetts predilections for Great Britain was illustrated by an entry in *John Quincy Adams' Memoirs*, I, May 10, 1808: "I called on Chief Justice (Theophilus) Parsons and had some conversation with him on political subjects. I found him, as I expected, totally devoted to the British policy and avowing the opinion that the British have a right to take their seamen from our ships, have a right to interdict our trade with her enemies, other than peace trade, and a right by way of retaliation to cut off our trade with her enemies altogether. He also thinks the people of this country corrupted, already in a state of voluntary subjugation to France. . . . The only protection of our liberties, he thinks, is the British navy."

who were not Democrats. If only Democrats led, 'the good sense of the country would correct the evil of construction (of the Constitution) when it should produce ill effects.' In the older and more stubborn Federalists, it naturally bred a sort of madness to see Mr. Jefferson turn loose-constructionist to do the very things which they most dreaded in their political calculations. In New England, it seemed to many who were high in the Federalist councils a thing not to be borne that a great field of expansion should be opened at the very doors of the South and West, to the undoing of the East, which had no free space in which to grow, and must lose her weight in affairs when the West came to its power. It was this that made them talk of disunion and of an independent Confederation to be set up at the North." [1]

In the third place, the Federalists were seriously alarmed at the inveterate hostility to the Federal Judiciary which Jefferson had so long displayed; for not only did they consider this to be an example of his insistence upon an unchecked, arbitrary, Executive power,[2] but they believed, and with much rea-

[1] *A History of the American People* (1902), by Woodrow Wilson, III, 183–184. Jefferson had said in his letter of Sept. 7, 1803, to Wilson C. Nicholas, regarding the annexation of Louisiana: "I had rather ask an enlargement of power from the Nation, when it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction. . . . I think it important in the present case to set an example against broad construction by appealing for new power to the people. If, however, our friends think differently, certainly I shall acquiesce with satisfaction, confiding that the good sense of our country will correct the evil of construction when it shall produce ill effects." *Jefferson*, X.

Jeremiah Smith wrote to William Plumer, Nov. 21, 1803: "Is it possible that we can stick together as a nation when there is so little cement and so much centrifugal force in this heterogeneous mass?" *Life of Jeremiah Smith* (1845), by John H. Morrison.

[2] The *Aurora*, Jan. 28, 1805, said the National Judiciary "is a prodigious monster in a free government — to see a class of men set apart, not simply to administer the law but who exercise a legislative and even an Executive power, directly in defiance and contempt of the Executive."

son, that in thus weakening the Judiciary, Jefferson was undermining one of the fundaments of the Constitution. "The persecution of the Judiciary power was believed by the Federalists to form a part of Mr. Jefferson's political system," wrote John Quincy Adams. "It was believed to be further stimulated by personal aversion to the Chief Justice, and by resentment for the decision of the Supreme Court in the case of Marbury and Madison. In the political creed of the Federalists, the independence of the Judiciary was the sheet-anchor of republican freedom. They thought they perceived in Mr. Jefferson's opinions and conduct a deliberate and systematic attempt to break it down; and they were seriously alarmed for the only barrier upon which they could rely for protection against proscriptions more terrible than mere removals from office. These apprehensions were perhaps exaggerated; but there was too much foundation for them. Mr. Jefferson's radical animosities and prejudices against the Judiciary power have had an unwholesome influence upon the public opinions of the American people. . . . The alarm and disgust of the New England Federalists at Mr. Jefferson's anti-Judiciary doctrines and measures were then prevailing at their highest pitch and were one of the efficient causes which led to the project of separation and a Northern Confederacy." [1] This view of Jefferson's policy was not confined to the North, but Southern Federalists felt also that, as one of their newspapers said: "It is an alarming fact that the same party which has brought us into our present difficulties entertain a deadly and exterminating hatred of the independence of the Judiciary, and pass by no occasion to vent upon them reproaches

[1] *Documents Relating to New England Federalism* (1877), by Henry Adams, letter to the Citizens of the United States in 1829, 160–162; *Baltimore North American*, July 29, 1808.

and injuries, in the hope of degrading them in the opinion of the people, and in order to reconcile the public to the blow which is meditated for their ruin and with them that of the public liberty." "I have unlimited confidence in our Judiciary," wrote Philip B. Key, in January, 1808, "but the storm that is gathering round them is alarming."[1]

Finally, ever since the enactment of the Embargo Laws in the latter part of 1807 and early in 1808, the Federalists of New England and New York were convinced that Jefferson was wantonly resolved to destroy the factor on which all their wealth and prosperity was deemed to depend — their sea-borne commerce. Throughout the spring, the excitement grew more and more intense; violations of the laws became frequent; obstruction to their enforcement arose on all sides; in some places open violence and forcible resistance had taken place. It was inevitable that the Federal Courts should soon be drawn into the situation, and that the question of judicial power should again arise as a serious political issue. It was, however, a matter of considerable astonishment and resentment to Jefferson that the first judicial act of interference with his Embargo Laws should come from his own Republican appointee to the Court, the young Judge, William Johnson, and from the strongly Republican State of South Carolina. The episode forms one of the most striking illustrations of judicial independence in American history, and deserves more detailed notice than has hitherto been given to it. The case in which Judge Johnson felt called upon to act arose in the United States Circuit Court for the District of South Carolina — *Ex parte Gilchrist.*[2] Un-

[1] *The Granville Estate and North Carolina*, by H. G. Connor, *Univ. of Penn. Law Rev.* (1914), LXII, quoting letter of Key, Jan. 4, 1808.

[2] 5 Hughes, 1; *Hall's American Law Journal* (1808); Federal Cases No. 5420.

der the Embargo Act of April 25, 1808, collectors of customs were required to detain any vessel ostensibly bound with cargo to United States ports, whenever *in their opinion* the intention was to evade the Embargo. In the enforcement of this law, Jefferson had assumed to direct the Secretary of the Treasury to instruct collectors to detain *all* vessels loaded with provisions and such a letter of instruction was sent out, in spite of the fact that the statute expressly vested the collectors with the right of determination as to detention.[1] This action had aroused intense excitement, especially at the North. It was termed "the most extraordinary, the most daring and unequivocal of all his insidious encroachments upon the liberties of the people", "despotic power gathering into the hands of the Executive officers." "The attempt to stop a vessel is wholly lawless; the Act which directs an official to do so is wholly unconstitutional; the circular is wholly without authority — an outrage on the dignity and sovereignty of a State, a violation of the sacred compact which unites these States."[2] A test of its legality was at once made in the Circuit Court, when on May 24, a vessel owner in Charleston petitioned for a mandamus to require the collector to grant a clearance of a vessel bound for Baltimore and loaded with rice, clearance of which

[1] *Works of Albert Gallatin* (ed. by Henry Adams, 1879), I, letter of Jefferson to the State Governors, May 6, 1808, in which he said: "Congress, therefore, finding insufficient all attempts to bind unprincipled adventurers by general rules, at length gave a discretionary power to detain absolutely all vessels suspected of intention to evade the Embargo Laws, wherever bound. In order to give to this law the effect it intended, we find it necessary to consider any vessel as suspicious, which has on board any article of domestic produce in demand at foreign markets, and most especially provisions." See also letter to Gov. Pinckney, July 18, 1808, *infra*.

[2] *Boston Repertory*, May 17, 20, 1808; *Boston Gazette*, May 19, 1808; *Connecticut Courant*, May 25, 1808, quoting also *Salem Gazette*, and *Washington Federalist*, which said that it appeared that the statute itself "does not go sufficiently far to gratify Mr. Jefferson's hatred to commerce"; *Charleston Courier*, May 23, 25, 1808.

had been refused by the collector, acting under the Presidential instructions, though he personally was of opinion that the vessel was not intending to evade the Embargo.[1] Four days later, Judge Johnson announced his decision, granting the mandamus and holding Jefferson's instructions to the collector to have been illegal and void, as unwarranted by the statute. "We are of opinion," he said, "that the Act of Congress does not authorize the detention of this vessel," under the facts presented; that without the sanction of law, "the collector is not justified by the instructions of the Executive in increasing restraints upon commerce. . . . At the utmost the collector could only plead the influence of advice, and not the authority of the Treasury Department, in his justification." And this young Republican Judge, then only thirty-six years old, and only four years after his appointment on the Supreme Bench by a Republican President, used these notable words of warning from the Judiciary to the President: "The officers of our government, from the highest to the lowest, are equally subjected to legal restraint; and it is confidently believed that all of them feel themselves equally incapable, as well from law as inclination, to attempt an unsanctioned encroachment upon individual liberty." [2]

No decision in a Federal Court ever rendered up to that time (except that in the *Burr Case*) received so full publication or so widespread notice in the newspapers. The Federalist press seized upon it with glee as a strong rebuke by a Republican Judge to a Republican President.[3] "We have never witnessed

[1] *Charleston Courier*, May 26, 28, 30, 31, 1808.

[2] *Hall's American Law Journal* (1808), I.

[3] *New England Palladium*, June 10, 1808; *Columbian Centinel*, June 15, 1808; *Boston Repertory*, June 10, 14, 1808, quoting *Gazette of the United States; Boston Gazette*, June 13, 16, 1808, quoting *Philadelphia Register; Charleston Courier*, May 30, June 25, 1808, quoting *Norfolk Ledger* (Va.); *Baltimore North American*, June

a decision which gave such general satisfaction," said the *Charleston Courier*. "It affords another memorable example of the necessity of an independent Judiciary who will give to the law the legal explanation." "We are glad to find by the decision at Charleston that there is some tribunal to which an American citizen can resort to know whether a public officer is conforming to law or not," said a Boston paper. "It gives us great pleasure to find that Judge Johnson has sufficient integrity and independence to make the laws of the land and not the will of the Executive the rule of his judicial conduct," said a Philadelphia paper. "Nothing in the conduct of the present Administration is so alarming to the liberty and independence of the country as the repeated attempts they are making to give to Executive proclamations and circular letters the force and effect of law. If the President could once get the control that he wishes and that his partisans wish to give him over the Court, the power of Congress would become as nugatory in this country as that of Bonaparte's Senate is in France, and Presidential mandates would constitute the law of the land"; and another Philadelphia paper said: "What must the decision of the country be and what the disposition of the Executive Government, when the judicial authority, appealed to by the citizens to rescue them from the fangs of a Secretary of the Treasury, is compelled to interpose its constitutional veto and to forbid a collector at his peril to execute instructions abridging the rights of the citizen?" A Virginia paper said: "The importance of an independent Judiciary to control the arbitrary or mistaken construction of the laws by Executive officers

6, 8, 1808; *American Daily Advertiser* (Phil.), June 8, 25, 1808; *National Intelligencer*, June 13, 1808; *Savannah Republican*, June 25, 1808.

cannot be appreciated too highly. We beseech the reader to reflect upon the subject seriously and view with more than ordinary suspicion the man who is hostile to an independent Judiciary. Let it not be said that the Judges are Federalists and enemies of the present Administration. Judge Johnson was appointed by Mr. Jefferson and proves from this Act that he is worthy of the appointment." A Baltimore paper said that the opinion would "add another ray to the lustre of the American Bench, that this gentleman who owes his elevation to Mr. Jefferson has not hesitated to maintain the predominancy of the law over Executive usurpations."

Some of the Republican papers attempted to minimize the effect of the decision, by denying that it was "a censure upon the President", and by asserting that the decree was rendered by assent of the collector in order to have the question of law settled. "It is not like the cases of Capt. Murray or Capt. Little under a former Administration, in which it was decided that their instructions were illegal so as not to protect them against actions of trespass for the damage occasioned." [1] Others assailed the Judiciary in general, the *Aurora* saying: "The following extraordinary case will be read with the greatest astonishment. It affords another memorable example of the profligacy of the Judiciary, who will give to the law an explanation perverting its intention and in violation of the most sacred rights and best policy of the Nation and Government. . . . An additional proof of the monstrous absurdity of what is called the independence of the Judges. They are, in fact, so independent of control and of every other tie but that

[1] *Independent Chronicle*, June 20, 1808; *Aurora*, June 9, 1808; *Baltimore Whig*, quoted by *Charleston Courier*, June 25, July 13, 1808.

of their own perverse will, against the very principles of the government, that unless their tenure of office is altered and that corps brought to some sort of responsibility, they must in the end destroy the government. If the laws and policy of the Nation are to be set aside upon a quibble, if the very principles of peace and war are to be involved in the wretched subterfuges and equivocations of this subtle class of men, what avails all the superiority of a representative government which cannot check or chastise the crimes of such a class?"

President Jefferson, himself, did not attempt to disguise the fact that he regarded Johnson's action as a direct attack upon him and upon his Embargo policy. If he had been indignant at Marshall's interference with his Executive functions, he was still more agitated at this invasion by his own appointee. Acknowledging receipt of the proceedings of the Court from Governor Pinckney of South Carolina, he wrote: "I saw them with great concern, because of the quarter from whence they came and where they could not be ascribed to any political waywardness." [1] To counteract the effect of this "oppugnation", he at once secured an opinion from his Attorney-General, Caesar A. Rodney, controverting Johnson's statement of the law, and this opinion he distributed widely to the press — "an act unprecedented in the history of Executive conduct." [2] "This question has too many important bearings on the constitutional organization of our government to let it go off so carelessly," he wrote to Governor Pinckney. "I send you the Attorney-

[1] *Works of Thomas Jefferson* (H. A. Washington, Ed.), IV, letter of July 18, 1808.

[2] See *History of the United States* (1890), by Henry Adams, IV, 263 *et seq.* See opinion in full in *Aurora*, Aug. 9, 1808; *American Citizen*, Aug. 5, 1808, quoting *Washington Monitor;* and in numerous other papers of both political parties; and *Hall's American Law Journal* (1808), I.

General's opinion on it, formed on great consideration and consultation. It is communicated to the collectors and marshals for their future government. I hope, however, the business will stop here, and that no similar case will occur. A like attempt has been made in another State which, I believe, failed in the outset." In this opinion, dated July 15, 1808, Rodney argued at length that under the Judiciary Act a Judge of the Circuit Court had no power to issue mandamus, contending that the statute vested that power exclusively in the Supreme Court; and he had the temerity to cite to Jefferson in support of this proposition the case of *Marbury* v. *Madison*, in spite of the fact that Jefferson had written, only the year before, to United States Attorney Hay in the Burr trial that he wanted "the gratuitous opinion" in that case "brought before the public and denounced as not law." Rodney further argued that Johnson's denial of Executive power to instruct was wholly unjustified, that "in this case there was a controlling power in the Chief-Magistrate", and that Johnson was seeking to impose unlawful restraints upon Government officers, agents of the Executive, in the due and legal administration of the law. "There does not appear in the Constitution of the United States anything which favours an indefinite extension of the jurisdiction of Courts over the ministerial officers within the Executive Department. . . . There appears to be a material and obvious distinction between a course of proceedings which redresses a wrong committed by an Executive officer, and an interposition by a mandatory writ, taking the Executive authority out of the hands of the President, and prescribing the course which he and the agents of any Department must pursue." This part of his opinion was, in fact, a direct

denial of the law as to the issue of mandamus to officers on whom Congress had imposed a statutory duty, as laid down by Marshall in the *Marbury Case*. On their publication, Rodney's views and the impropriety of Jefferson's action were commented on with derision, indignation and condemnation by the Federalist press.[1] The *Charleston Courier* termed it a "new stroke of Executive policy" and denied that any authority was to be found in the Constitution or the laws, for an Executive officer "to sit in judgment on the decisions of an independent tribunal." It asked: "What is the object of this letter? Is it published by authority, *in terrorem?* Is it meant to show the Presidential disapprobation of the decree of the Court? Where does this lead? Stride after stride, and the Judiciary will be thus trampled into contempt! Beware, citizens, 'ere 'tis too late." A Philadelphia paper said that the Attorney-General lately assumed the desperate task of upholding the President's circular and that the whole of his ingenuity had been put into requisition. "It is one of those abortive and indecorous attempts, the like of which has never been witnessed by the citizens of the United States who have been accustomed to regard in reverence the solemn decisions of the highest tribunals, as the criterion of Executive usurpations and the . . . subservience of the opinions of its agents. Well may we consider our liberties as in danger, when the constitutional organs to pronounce what the law is are contemned by an officer, who exists in the breath

[1] *Charleston Courier*, Aug. 9, 16, 22, Sept. 6, 12, 14, 20, 1808; *Baltimore North American*, July 26, 29, Aug. 3, 1808; *New York Commercial Advertiser*, Aug. 13, 1808, quoting other papers and publishing letters from correspondents; *National Intelligencer*, Aug. 1, 1808; *Savannah Republican*, Aug. 11, 1808; *Boston Repertory*, Sept. 23, 27, 1808, quoting letter from "Tullius" of Virginia in *Gazette of the United States; New York Evening Post*, March 23, 1809; *American Daily Advertiser*, Feb. 6, 1809, quoting letter in *Savannah Museum*.

of the Executive whose act is in controversy, and that contemnacy is approved and sent to subordinate agents as the rule and the reason of not obeying the pronounced law of the land." Another wrote: "The novel idea of setting up the opinion of the Attorney-General by our Executive in opposition to the solemn judgment of the Circuit Court cannot fail to attract the attention of our citizens and the surprise of all foreigners. Mr. Jefferson is himself a lawyer and ought to know how degrading to the Court and how dangerous and unconstitutional is such a precedent. The opinion is a labored apology for the conduct of government and ought to be received with caution, and the legality of it is certainly very questionable." Another wrote that the "Grand Caucus at Washington" had sent to every collector an opinion of the Attorney-General "commanding them to disobey all mandamus that may hereafter issue from the judicial Courts. Americans, pause and reflect! The once independent Judiciary of the United States, the bulwark and safeguard of all you hold valuable, is about to be subverted." A legal correspondent wrote that Rodney's "quibbles and misrepresentations, little comporting with that dignified conduct which ought to characterize the Attorney-General", were in reality intended, not for the President, but for the public, and were, therefore, "couched in a language calculated to impose on the uninformed, and concluding with insinuations corresponding with the vulgar prejudice against the Judiciary. This preparing and publishing such an opinion is truly characteristic of the man who directs the destinies of this unfortunate country. To such a man, an Attorney-General who will descend to misrepresentation and sophistry, who will defend the proceedings of his master, *per fas*

et nefas, who does not hesitate to furnish aliment for that unfounded jealousy of the Judiciary which pervades the country and threatens to destroy the fairest principles of our law — to such a President, such an Attorney-General is above all price. The world may truly say of them — *par nobile fratrum*." Another wrote later of the opinion of "Caesar Rodney that obsequious lackey and ever-ready tool of Mr. Jefferson . . . endeavoring to prove that it was the right of the Secretary of the Treasury and the President to expound the laws and that the Court and Judges had nothing to do with them . . . a scandalous invasion of the people's rights." A Southern correspondent wrote: "What a manifest violation of the principles of right and freedom are displayed by the Executive in these instructions! An innovation that, if not duly resisted and broken through by the power of the Judiciary, would render us in this Southern quarter, were it to have effect, solely at the will of the President; for if provisions were to be prohibited from being transported coastwise, we should soon feel all the effects of the severest famine. By recognizing in the Executive such a power, we would in a manner be putting our very existence into his hands."

In reply to this criticism, the Republican papers praised the opinion as a just rebuke to the Judge. "It is clear and lucid, supported by irresistible argument and legal fact, and goes far to destroy that operative influence which the Federal party expect to use to mar the proceedings of the Executive in the discharge of their great and important National duties. In fact, the issuing of a writ of mandamus by a Circuit Court is considered as an assumption by the Judiciary both of the Legislative and

Executive duties, and as such ought not to be submitted to." [1]

Upon finding that the opinion had been given to the press and sent to the Federal collectors, Judge Johnson took the unusual course of issuing to the public an elaborate and somewhat pugnacious defense of his decision and further explanation of the legal grounds on which it was based, in controversion of Rodney's argument.[2] "The Courts do not pretend to impose any restraint upon any officer of government, but what results from a just construction of the laws of the United States," he said. "Of these laws, the Courts are the constitutional expositors, and every department of government must submit to their exposition; for laws have no legal meaning but what is given them by the Courts to whose exposition they are submitted. It is against the law, therefore, and not the Courts that the Executive should urge the charge of usurpation and restraint — a restraint which may at times be productive of inconveniences, but which is certainly very consistent with the nature of our government — one which it is very possible the President may have deserved the plaudits of his country for having transcended, in ordering detentions not within the Embargo Acts, but which, notwithstanding, it is the duty of our Courts to encounter the odium of imposing." After reinforcing his argument with numerous citations from Jefferson's bugbear, the *Marbury Case*, he concluded with these bold words: "There never existed a stronger case for calling forth the powers of a Court; and whatever censure the Executive sanction may draw upon us, nothing can de-

[1] *American Citizen* (N. Y.), July 30, 1808, quoting *Baltimore North American; Richmond Enquirer*, July 29, 1808.

[2] *Charleston Courier*, Oct. 15, 17, 18, 1808; *Hall's American Law Journal* (1808) I, letter of Johnson, Aug. 26, 1808.

prive us of the consciousness of having acted with firmness, impartiality and an honest intention to discharge our duty. . . . It may be possible to prove the Court wrong in interposing its authority; but certainly establishing the point of their want of jurisdiction will not prove the legality of the instructions given to the collector. The argument is not that the Executive have done right, but that the Judiciary had no power to prevent their doing wrong."

These sentiments coming from a Republican Judge again elicited enthusiastic approval from the Federalists. "They are expressed in a bold, manly, energetic and indignant style, evidently flowing from a mind conscious of rectitude and superior intelligence," said one paper. "Since the present Administration came into power, a contest has been maintained without intermission between the Executive and the Judicial departments. The hostility of Mr. Jefferson to an independent Judiciary is by no means a matter of conjecture — it is a known and undoubted fact. Either directly, or through the agency of others, he has made many dangerous attacks upon this department. He has been successful in only one; but if either he, or men of similar sentiments, continue to retain their influence over the people, he will ultimately prevail. It is, therefore, of consequence that full information upon any question connected with the system should be laid before the people." [1] And another said: "The Judge reprehends, with an honest and independent spirit becoming his high station and essential to the public liberties which are in his keeping, this unheard-of attack by Executive officers

[1] *New York Commercial Advertiser*, Nov. 2, 1808, quoting *Baltimore Federal Republican; Baltimore North American*, Oct. 29, 1808; *Charleston Courier*, Nov. 16, 1808. Republican newspapers also published Johnson's reply in full, see *American Citizen*, Nov. 7, 8, 1808.

upon the privileges and respect due to his office." Attorney-General Rodney was considerably aroused by Judge Johnson's reply and wrote to Jefferson the following interesting and pungent letter, suggesting that an answer be made to what he termed "Johnson's apology for his opinion": [1]

. . . It is very evident that Judge Johnson has taken serious offence at the publication of the examination of his opinion. He seems to forget that all his proceedings have gone abroad and were published in every State in the Union. It would seem but fair that the bane and the antidote should circulate together. He has enlisted fairly under the banner of the Judiciary and stands forth the champion of all the *high-church* doctrines so fashionable on the Bench. I cannot but lament the state of my profession. There was a period, and a proud period it was, when they acted a patriotic part. Now they are, in general, for destroying the fair fabrick which the profession contributed so much to erect. The judicial power, if permitted, will swallow all the rest. They will become omnipotent. No other Administration than yours could progress under such circumstances. It is high time for the people to apply some remedy to the disease. You can scarcely elevate a man to a seat in a Court of Justice before he catches the leprosy of the Bench. I had understood that Judge Johnson last winter, in consequence of your remarks in the Message relative to the Circuit Court of Virginia, had made a question with the Bench whether the Judges should wait on the President. Judge Washington gave the casting vote in favor of so doing. I could not credit it at the time, but I now suspect the report was correct. He breathes throughout a spirit of hostility to the present Executive, and has, perhaps, some view as to the election of a future, from the period at which he has published. His piece may be easily assailed, for it is extremely vulnerable. Shall I enter the lists with him in a temperate review of his observations?

[1] *Jefferson Papers MSS*, letter of Rodney, Oct. 31, 1808; this letter seems never to have been published. Jefferson's reply does not appear in any of the printed collections of his correspondence, or in his MSS papers in the Library of Congress.

Shall I defend in my individual capacity an opinion given in my official character? The case really does not require it and the course might be deemed incorrect.

The extreme Republican resentment over the Judge's attitude was manifested by the extraordinary action taken by a Grand Jury of the Circuit Court in Georgia which stated in a presentment: "We cannot pass unnoticed the attempt of the Judiciary to defeat the intentions and salutary measures of our government, by issuing a mandamus and compelling an officer of the revenue to violate those measures. Sophistical or logical deductions made in justification of such conduct are not satisfactory. We hope and trust such daring precipitancy will never, in future, be exercised by any of the Judges of the Courts of the United States" — a presentment "for improper interference with the Executive", so the papers stated. This condemnation drew from Judge Johnson another sturdy reply, December 15, 1808: "It is very far from correct in fact that the Circuit Court had the least wish or idea of embarrassing the execution of the Embargo Laws. The single question before the Court was whether the law or the instructions of the Executive was to govern. If you are prepared, gentlemen, to waive the government of the laws and submit without repining to every errour or encroachment of the several Departments of government, avow it to your fellow citizens, and prevail on them to abolish the Constitution, or get into office a feeble and submissive Judiciary. For what cause are we now reproached? For interposing the authority of the laws in the protection of individual rights, of your rights and the rights of succeeding generations. If such is to be the reward of his discharge of a painful and invidious duty, so important to the security of those who

censure us, small will be the inducement to discharge it with fidelity." [1]

Meanwhile, acting upon Jefferson's directions transmitted in the Attorney-General's letter of July 15, the collectors of customs were disregarding Judge Johnson's decision. "The opinion has ever since been acted upon, in preference to the decision," said a Baltimore paper. "This obstinacy and disregard of the Judiciary has been acquiesced in by the public. . . . Though this is a novelty in our country of the most serious and alarming tendency, it is not unsuitable to the various attempts which have been made to bring down the Judges to a dependent condition and to give the Executive an equal right of expounding the law and enforcing its exposition upon the officers who are subordinate to it." There were, however, some collectors who were unwilling to take so extreme a step. "Mr. Gelston here (of New York), cautious as he is, has nerve and zeal and has made several doubtful seizures, for which he is sued," wrote Gallatin to Jefferson in July. "But we cannot expect that the collectors generally will risk all they are worth in doubtful cases; and it results that, until Congress meets, we must depend entirely on force for checking this manner of violating the laws." [2] Another judicial obstacle to the en-

[1] *New York Commercial Advertiser*, Feb. 1, 1809; *American Daily Advertiser*, Feb. 6, 1809; *Savannah Republican*, Dec. 20, 1808.

A singular fact as to this controversy was that, on the question of law as to the power of the Circuit Court to issue a mandamus to a Federal official, Rodney was correct (though stating the wrong ground for his view) and Johnson was wrong; for, five years later, the Supreme Court in *McIntyre* v. *Wood* (1813), 7 Cranch, 504, decided that the Circuit Court had no such power to issue an original writ, as under the Judiciary Act it could only issue a writ "when necessary for the exercise of their jurisdiction." In this case, Johnson explained that he issued the writ with the acquiescence of the collector; but of course consent cannot give jurisdiction. See as to this case, *Jurisdiction in Mandamus in United States Courts*, by Glendower Evans, *Amer. Law Rev.* (1885), XIX. See also *Marshall*, III, 154, note.

[2] *Works of Albert Gallatin* (1879), I, letters of Gallatin, July 29, Aug. 6, 1808, letter of Jefferson, Oct. 25, 1808, letter of Gallatin to Giles, Nov. 24, 1808.

Gallatin wrote to Jefferson, Nov. 8, 1808: "It is necessary to examine what

forcement of the law now arose. "A new attempt is also made to prevent detention through the medium of State Courts, which you will find stated in the enclosed letter from the collector of Newport," wrote Gallatin to Jefferson. "I have in my answer directed him to pay no obedience to such efforts to defeat the law, as the State Courts have no shadow of jurisdiction in such cases. Still this increases our difficulties." To these letters, Jefferson replied that a bill ought to be introduced in Congress making the discretion of the collector expressly subject to Presidential instruction, and restricting the issue of mandamus. Accordingly, Gallatin wrote to Senator William B. Giles, as soon as Congress convened, explaining the difficulties of enforcement of the Embargo under the existing law and suggesting the legislation desired by the President. More cautious than Jefferson, however, he expressly admitted the correctness of Judge Johnson's view of the law, for he stated that the Executive instructions could now be given "only as opinion and operate as a recommendation and not as an order"; and he continued: "On the subject of mandamus, I will only observe that in the only instance which has taken place, the Court, supposing they had jurisdiction, could not, from the manner in which the question was brought before them, have decided otherwise than they did; but it is desirable that the question of jurisdiction, as it relates either to the Courts in which the power ought to be vested or to the cases to which it should extend, should be precisely defined by law." On December 12, 1808, Giles introduced in the Senate an Enforcement Bill conforming to the President's desires, but omitting any changes in the Judiciary Act

provision may be introduced in an Judiciary Act which will protect our laws and collectors against encroachments of State officers."

relating to the issue of mandamus. At the same time, he took occasion to express his views of the Federal Judiciary, with especial reference to Chief Justice Marshall and to Judge Johnson.[1] "My respect for judicial proceedings is materially impaired," he said. "Latterly, in some instances, the callous insensibility to extrinsic objects, which, in times past, was thought the most honorable trait in the character of an upright Judge, is now, by some Courts, entirely disrespected. . . . When Judges so far forget the true character and dignity of their stations, judicial proceedings cannot long preserve the respect heretofore attached to them." He returned to his attack of the previous year on Marshall's conduct of the Burr trial, in the following bitter words: "You have seen your Judiciary publicly held up to the world as a spectacle of disgrace. You have seen a jury sworn to try an issue in a criminal case and excluded from the privilege of hearing the most material evidence upon which the issue depended. You have seen treason go unpunished . . . the painful mortification of beholding the most atrocious treason stalking unpunished through the land, triumphing in a security afforded, it is feared, through the hostile propensities of the Judge against his own Government, or at least against the Administration of his own Government." To this unmerited and unjust assault, Senator James Hillhouse of Connecticut, who was one of the leaders in denunciation of the Embargo Act and who was himself refusing to accept a decision upholding its constitutionality recently made by a Federalist Judge, replied in defense of the Judges. He regretted that Giles "should have felt himself at liberty to travel out of his way to cast reproach on the Judiciary. The Judges, by a faithful

[1] *10th Cong., 2d Sess.*, speeches of Giles and Hillhouse, Dec. 21, 1808.

discharge of their duty (sometimes being obliged to withstand popular error, and sometimes to interpose themselves between a defenceless individual and Executive power), are exposed to their full share of opprobrium." He denied that the acquittal of Burr was due "to any indisposition in the Judge to do his duty"; and said that, on the contrary, the Judge "manifested great integrity and firmness in adhering to the established rules of proceeding in criminal trials, which are the great shield of innocence against oppression; and in giving a fair trial to a political opponent, against whom the popular current ran high, and whose prosecution was aided by Executive influence and power."

Meanwhile, before the introduction of this new Enforcement Law in December, 1808, the legal status of the Embargo Act had been settled in the Courts. By a singular stroke of irony, Jefferson, who had for the past five years denounced the Federal Judiciary and their exercise of power, now saw his own pet legislative measure and his own authority upheld in the fullest measure by one of these hated Federal Judges, and by a Judge who was a member of the Federalist Party. In this instance judicial independence worked in favor of the President.

Ever since the passage of the first Embargo Act, the chief weapon employed against it in New England had been a claim as to its unconstitutionality. This contention received great support from the public position taken by Theophilus Parsons, the Federalist Chief Justice of the Supreme Judicial Court of Massachusetts. "There is in Massachusetts," wrote John Quincy Adams to Ezekiel Bacon (a Congressman from that State), "a Judiciary of which you may think what I cannot say." "It was with a repugnance I could not express," he wrote later, "that I saw a desperate party

leader in the Chief Justice of the Commonwealth. It was from him alone that the pretence of the unconstitutionality of the Embargo derived any countenance. Even Mr. Pickering had not ventured to start that idea. It was the stimulus to the people of forcible resistance against it. It was a gigantic stride towards a dissolution of the Union. Mr. Parsons not only broached the opinion, but very extra-judicially made no secret of it, upon the Exchange and at insurance offices." [1]

The Republicans themselves were placed in somewhat of a dilemma in viewing the prospect of a judicial decision upon the question. The Embargo Law was a far more extreme exercise of Congressional power than either Republicans or any one else had believed possible under the Constitution. Whatever else was doubtful, no one could doubt that, under the doctrine of State-Rights and the rules of strict construction, such a law was unconstitutional; and only by the widest theories of liberal construction could its validity be sustained. The arguments in its favor were arguments which hitherto had been regarded as fatal to public liberty and to State sovereignty.[2] Many Republicans were, there-

[1] *J. Q. Adams Writings*, III, letter to E. Bacon, Nov. 17, 1808: "The Embargo is unfortunately one of those measures upon which the two public authorities may be brought in collision with each other, and that the party has been laboring with unwearied industry to produce that effect, the proceedings of our Legislature, the instigations to resistance against the embargo laws on the pretence of their unconstitutionality, the countenance given to this paltry pretence by a State Judge (Parsons) and the connection between the extra-judicial opinions and the attempts at forcible resistance, which have already been made, and with the experiment upon the District Court at Salem, afford the evidence which the most purblind observer cannot but observe." See also *Documents Relating to New England Federalism* (1877), by Henry Adams, 223, letter of Adams to the Citizens of the United States in 1829; letter to Bacon, Dec. 21, 1808. *Reminiscences of Samuel Dexter* (1857), by "Sigma", 84: "In those feverish days, the office of the Suffolk Insurance Company was more noted for its daily political harangues than for its semi-annual dividends. There, the prominent leaders of the Federal party were in the habit of dropping in and talking over the topics of the day. . . . The voice of Mr. Parsons, then Chief Justice, was often heard on these conventicles, not in his official capacity, of course, but as the Magnus Apollo of the Assembly."

[2] *History of the United States* (1890), by Henry Adams, IV, 263 *et seq.*

fore, adverse to allowing the Federal Courts to pass upon the question, if it could be avoided.[1] The Federalists, while convinced of the unconstitutionality of the law, had practically determined to resist its enforcement, regardless of judicial decision. It was amid such conditions that the constitutional question arose and was argued for the first time, in the United States District Court for the District of Massachusetts before Judge John Davis sitting at Salem, in the case of *United States* v. *Brigantine William.* From the standpoint of the Republicans who distrusted the Judiciary, the case could have been presented before no more unfavorable tribunal. Judge Davis was a man sixty-five years of age; he had been United States Attorney under President Adams and had been appointed by the latter as District Judge in 1801. He was a strong Federalist in politics; his personal friends and his surroundings were Federalist; his judicial associates on the Massachusetts Bench were Federalist. The leading Federalist paper in Boston rejoiced that "at length a most serious and solemn question has arisen under the Embargo Law and is brought into discussion before a Judicature competent to pronounce a decision." Another grew emotional over the prospect, saying: "From the weight of talents engaged the arguments will attract a high degree of public interest. . . . A more important crisis has seldom, if ever, existed in this country. Should the Embargo Laws be admitted to be constitutional, farewell to the freedom of

[1] Later, the *New York Commercial Advertiser,* March 3, 1809, quoted the *Trenton Federalist* as saying: "The Democrats publish in their papers, that if any citizen is so daring as to question the constitutionality of any of the provisions of the late forcing embargo Act of Congress, by appealing to the Judiciary, they ought not to keep their heads on their shoulders one hour." The *Independent Chronicle,* Sept. 26, 1808: "Common sense must dictate that the Judge has no right to decide on so important a question." See *ibid.,* Dec. 15, 1808, speaking of "the arrogance of lawyers in assuming to stop the process of a Court by a plea that the law is unconstitutional."

commerce. We shall see it no more, until by a new constitution, we have secured our constitutional privileges more fully than mere words can do. Should the Law on due examination be declared unconstitutional, then may we soon be once more free, and every man at liberty to judge for himself of the risks of the sea and despatch his vessel if he should think proper. We trust that at least the Judge and Jury will not be afraid to do their duty, let it offend whomsoever it may." [1] In favor of the Embargo, there appeared Joseph Story, then a young man of twenty-nine years (who three years later was to be appointed upon the Supreme Bench), Francis Blake and George Blake, and against the Law, William Prescott and Samuel Dexter (aided by Christopher Gore). The weight of legal talent was clearly against the Government. It is interesting to note that Joseph Story supported the constitutionality of the Embargo, though, a year later, he favored its repeal in Congress, and many years later, after he had become wholly converted to Marshall's broad views of the Constitution, he wrote that: "I have ever considered the Embargo a measure which went to the utmost limits of constructive power under the Constitution; it stands on the extreme verge of the Constitution." [2] The argument was thus described by a Republican paper: "The deep interest the public felt on the question excited great attention, and the Court-house, for several days while the question was discussed, was crowded. Mr. Story opened the cause in behalf of the Government, and Messrs. Prescott and Dexter assisted by a number of the most eminent lawyers at the Bar argued the unconstitutionality of the law at great length, with much ingenuity and more sophistry. They were answered on the side of the

[1] *Columbian Centinel*, Sept. 21, 1808; *Boston Gazette*, Sept. 12, 19, 1808; *National Intelligencer*, Sept. 28, 1808; *Savannah Republican*, Oct. 13, 1808.

[2] *Story*, I, 185, autobiographical sketch written in 1831.

Government by Mr. Francis Blake, in a strain of eloquence highly gratifying, and by his brother Mr. George Blake, District Attorney, with a strength and pertinency of argument which do him great honor." Another spoke of the "full and fair discussion after the most scientific and ingenious attempts to prove the unconstitutionality of the law by Prescott, and Dexter, assisted by Christopher Gore. The discussion was concluded by George Blake in a strain of dignified and manly eloquence which reflects on him the highest honor. The constitutionality of the law was clearly pointed out, its policy illustrated with energy and argument and its eventual beneficial effects portrayed in strong and lively color. During the whole of this interesting debate on the fundamental principles of our government, the Court-house was thronged with people of respectability from Salem and the towns in the vicinity." [1]

On October 3, 1808, a week after the argument, Judge Davis rendered his opinion, sustaining in the broadest terms the legal validity of the statute, and construing the constitutional powers of Congress in respect to it as broadly as Marshall himself at his zenith could have done. Not only did he uphold the Embargo as a regulation of commerce, but he held it valid under the war power as a preparation for war, and under the "necessary and proper" clause as appropriate to carrying out the purposes of the Constitution and protecting the inherent sovereignty of the Nation.[2] With extraordinary

[1] *Essex Register* (Salem, Mass.), Oct. 5, 1808; *Independent Chronicle*, Oct. 6, 1808; *Richmond Enquirer*, Oct. 25, 1808; *National Intelligencer*, Oct. 10, 12, 1808. See also *Columbian Centinel*, Sept. 24, 1808; *American Daily Advertiser*, Sept. 28, 1808; *Charleston Courier*, Oct. 12, 1808. "During this long discussion, the hall was crowded and the anxious assembly listened with the most profound attention to the arguments in which great knowledge, ingenuity and eloquence were displayed."

[2] *United States* v. *Brigantine William, Hall's American Law Journal* (1808), II, Federal Cases No. 16700. The curious fact may be noted that though Judge Davis devoted a large part of his opinion to the question whether the Court had power to pass upon the constitutionality of the Act of Congress, and cited several

inconsistency, the Republicans hailed the decision with glee. Descriptions of the argument and of the decision were published in their papers all over the country. "Judge Davis delivered a decisive opinion in favor of the constitutionality of the Embargo Law. His opinion appeared to be the result of deep investigation and sound, deliberate reflection — it was luminous, learned and eloquent beyond anything we recollect of the kind," said one; and another said: "Judge Davis, after a very learned and elaborate decree, pronounced a clear and decided opinion in favor of the constitutionality of the Acts. In the course of this decree, the Judge expressed in the fullest manner his concurrence with the counsel for the Government in all the leading positions, and seemed also to coincide with them in sentiments, that in none but flagrant cases, and where a law of Congress was clearly repugnant to some express provision of the Constitution would it be competent for a Court to decide upon its validity." [1] Another said

Federal Court authorities, his attention was not called to the case of *Marbury* v. *Madison*, decided five years before, until after he had rendered his decision.

See *Reminiscences of Samuel Dexter* (1857), by "Sigma": "After Judge Davis had decided that the law was constitutional . . . Mr. Dexter persisted in arguing the question of constitutionality to the jury, notwithstanding the remonstrances of the Bench. At length, Judge Davis, under some excitement, and after repeated admonitions, said to Mr. Dexter, that if he again attempted to raise that question to the jury, he should feel it his duty to commit him for contempt of Court. A solemn pause ensued, and all eyes were turned towards Mr. Dexter. With great calmness of voice and manner, he requested a postponement of the cause until the following morning. The Judge assented. . . . On the following morning, there was a full attendance of persons, anxious to witness the result of this extraordinary collision between the advocate and the Judge. . . . . Mr. Dexter rose, and facing the Bench, commenced his remarks by stating that he had slept poorly and had passed a night of great anxiety. He had reflected very solemnly upon the occurrence of yesterday. . . . No man cherished a higher respect for the legitimate authority of these tribunals before which he was called to practice his profession; but he entertained no less respect for his moral obligations to his client. . . . He had arrived at the clear conviction that it was his duty to argue the constitutional question to the jury . . . , and that he should proceed to do so, regardless of any consequences."

[1] *Essex Register*, Oct. 5, 1808; *Independent Chronicle*, Oct. 6, 1808; *Richmond Enquirer*, Oct. 25, 1808; *National Aegis*, Oct. 4, 1808; *Savannah Republican*, Oct. 22, 1808.

that this solemn decision was "a source of mortification to the friends of Britain. They had indulged the vain expectation of making these high judicial officers the tool of a desperate faction. They were indeed justified by past events. They had much reason to hope that magistrates of inferior jurisdiction could be bent to vile purposes, when they had witnessed the success of their arts with those of superior authority. Could they have procured a decision that the Embargo was unconstitutionally imposed, they would have thought their triumph complete—Government would have been set at defiance—its regular officers resisted, and a state of anarchy and bloodshed ensued. The Union would have been rent asunder. Federalism would have had full scope for a display of its disorganizing and turbulent disposition. Let us thank Heaven, then, that their aims have met this signal defeat—that we have escaped the calamities inseparable from the clashing of the Legislative and Judicial Departments. Republicans deny the right of the United States Courts to judge upon the question. Since, however, they have thus far decided correctly, it may be rather beneficial than injurious. But we will never allow that any legal precedent has been furnished for further interference."

The Republicans also praised the courage of the Judge, and with much reason, for his decision undoubtedly was one of the most striking illustrations of judicial impartiality rising above the influence of partisan influence to be found in the history of the law; and the following tribute from his political opponents was well deserved: "To Judge Davis much credit is certainly due, not for doing his duty, but this we do say, that when the Magistrate rises superior to the rebellious views of his party and adheres to the Constitution and the law, the temple of justice becomes bold and the

rights of the people are secure." That Judge Davis was subjected to much influence to render a contrary decision was stated by John Quincy Adams, who wrote, a few months later, to William B. Giles:[1] "You know that the doctrine has been broached here that the Embargo Laws were unconstitutional, and as such not entitled to submission. The history of this doctrine, and the manner in which it was propagated until the decision of the District Judge at Salem, is perhaps not fully known to you. While you have been candidly informed of the regular gradation through petition, remonstrance and legislative resolutions to insurrection and rebellion against the Union which are here avowed and recommended, you have not been told how important a step in the progress a judicial decision against the Embargo Laws was intended to be. You have not heard what means were used and by whom to bias that decision, nor how much disappointment has followed from that honest firmness and incorruptible integrity of our District Judge. These are things of which little will be said, but whoever traces the *real* history of our advance towards resistance will not forget the *judicial* battery which has been attempted to be brought into action, nor fail to perceive the effect with which it would have operated if it could have been brought to bear. In speaking of the firmness and integrity of the District Judge and of the means used to bias his mind, I do not hint at any *direct* attempt upon his honesty, but to a sort of influence which was certainly used, and which must have had its sway upon his judgment, had not his good sense and his spirit been superior to every consideration of party management."

The Federalists received the decision with the utmost surprise and dismay, and their press proceeded to ignore it absolutely. Their attitude was thus commented on

[1] *J. Q. Adams Writings*, III, letter of Dec. 10, 1808.

by their opponents: "While the Federal papers (especially the *Centinel*) have been so alert in publishing British news and abuse of the President, they have been equally careful not to inform their citizens of the discussion of the Judge in Salem on the constitutionality of the Embargo. The Essex Junto now say — the Judge has not nerve enough for their purposes. Though we deny the right of the Judge to act on this question, yet we are glad to find he has mortified the Junto by his decree," wrote one, and another said: "It puzzles the opposition how to make an apology to their friends for the decision of the District Judge. It will not answer to impeach his talents or his virtues. According to the new doctrine, he cannot, like Mr. Adams, be touched in his office. At length, with the usual effrontery, after having made the question of the greatest consequence, it is thought best to laugh it out of sight as of no importance. We hope to hear no more of the unconstitutionality of the Embargo." [1] Further legal struggle against the Law evidently appeared useless to the Federalists, and their defeated counsel did not venture to appeal to the Supreme Court. Samuel Dexter, strong as were his Federalist convictions, was also one of the foremost lawyers at the Federal Bar in Washington, and he knew well that Chief Justice Marshall and his three Federalist Associates were unlikely to take any narrower view of constitutional powers than Judge Davis had done. While the Court had as yet rendered no decision on the Federal power to regulate commerce, it had given the

[1] *Independent Chronicle*, Oct. 6, 1808; *Essex Register*, Oct. 12, 1808. The Federalist *Boston Repertory*, Oct. 7, 1808, said: "The *Chronicle* boasts of the decision . . . and we are not disposed to question its propriety," but it said it was not particularly interested as it was confident that the Embargo was to be repealed.

Henry Adams in his *History of the United States*, IV, 268 *et seq.*, says that Davis' opinion was printed in every newspaper. This seems to be a mistake. Many of the Republican papers printed it; the Federalist papers, almost as a body, either made no mention of it or gave to it a very brief reference. See *Boston Gazette*, Oct. 6, 1808.

broadest possible scope to the "necessary and proper" clause of the Constitution in *United States* v. *Fisher*, only four years before; and Dexter had no hope of persuading the Court to relax its views on the Embargo for the benefit of the Federalist Party.[1] It would appear, however, that Chief Justice Marshall himself was reluctant to express his views at this time. For, while the Federal Judges in Virginia in 1800 had never hesitated to charge the Grand Juries with respect to the constitutionality of the Alien and Sedition Laws, they now preserved a discreet silence as to the Embargo — so much so that a correspondent of the *Richmond Enquirer*, a member of the Grand Jury, wrote that "notwithstanding the silence of the Court on the violations of the Embargo Laws, the Grand Jury are determined to do their duty."[2] Though many cases involving the question were appealed to the Supreme Court in the subsequent years, the constitutional question was never presented. In a case in the Circuit Court in New York, in 1810, Judge Brockholst Livingston stated that the point had been raised, but as it had not been argued by counsel, "the Court will not take upon itself the high and delicate office of pronouncing any law of the United States unconstitutional, unless the case were so clearly so that it were scarcely possible for any two men to differ in sentiment. . . . This is so far from being the case with these laws, that it is in the knowledge of the Court and matter of general notoriety, that many condemnations have taken place under them; and although this question has been made and fully argued in some of the inferior tribunals of the United States, yet the Su-

[1] Henry Adams in his *History of the United States* said as to *United States* v. *Fisher*: "Constructive power could hardly go further, and the habit of mind which led to such a conclusion would hardly shrink from sustaining Judge Davis' law." See also Letter of John Quincy Adams to the Citizens of the United States in 1829, in *Documents Relating to New England Federalism* (1877), by Henry Adams.

[2] *Richmond Enquirer*, Dec. 2, 1808.

preme Court, although many cases have gone there on appeal, has never been called on to say that they were repugnant to the Constitution." Fourteen years later, however, the question had become so settled by general acceptance that Marshall in *Gibbons* v. *Ogden* was able to speak of "the *universally acknowledged power* of the Government to impose embargoes."[1]

While refusing to appeal the decision, the Federalists proceeded systematically to deny its correctness and to resist its application in subsequent criminal cases in the United States District Court. "Already, notwithstanding the decision of the District Judge on the constitutionality of the existing Law, the juries will not convict for violations of them," wrote Adams in December; and again: "There may be impediments to execution (of the Laws) besides those known to the Constitution. . . . The District Court, after sitting seven or eight weeks and trying upwards of 40 cases, has at length adjourned. Not one instance has occurred of a conviction by jury; and finally one of the jurymen is said to have declared that he never would agree to convict any person under these Laws, whatever might be the facts. The Judge has been firm and decided in support of the Laws as far as his authority extended." [2]

Two other judicial obstacles to the successful operation of the Embargo appeared at this time, due to the ruling of Judges of the Court sitting on Circuit, — one by Judge Brockholst Livingston, a Republican, the other by Chief Justice Marshall. The first arose in connection with the seriously rebellious conditions prevalent in Vermont. For many months, there had been countless violations of the Embargo in the smug-

[1] *Sloop Elizabeth*, 1 Paine, 10, in 1810; *Gibbons* v. *Ogden*, 9 Wheat. 191, in 1824; see also *United States* v. *Marigold*, 9 How. 560, in 1850.

[2] *J. Q. Adams Writings*, III, letters to Ezekiel Bacon, Dec. 21, 1808, to W. B Giles, Dec. 20, 1808, Jan. 16, 1809.

gling of potash, tea and many other articles across the Canadian boundary line. Both the State troops and the Regular Army had been called upon to aid in enforcing the law. As early as May, the President had proclaimed a part of Vermont to be in "a state of insurrection." Murders of revenue officers and other acts of violence had been increasing in number, culminating in September in the murder of three of the State militia. "We predicted that such events must soon succeed the treasonable language of the Northern Federalists and Federalist Memorials. The tories of the day are daring and insolent. . . . They are advocating British insults and murders and domestic insurrection, and in every corner. We all know it, we see it, we hear it, every day, and read it in every Federal print," said a Vermont paper.[1] On directions from Attorney-General Rodney, in an effort to impress upon the citizens the seriousness of the situation, the smugglers and murderers of the militiamen had been indicted for treason, and they had been tried in the United States Circuit Court before Judge Livingston and District Judge Elijah Paine The Court held, however, that such an indictment could not be sustained, and that "no single act in opposition to or in evasion of a law, however violent or flagrant when the object is private gain, can be construed into levying war against the United States"; and Judge Livingston said in charging the jury: "If the prisoner, among others, was hired for the purpose

[1] *Bennington World*, quoted in *Savannah Republican*, Sept. 22, 1808. This rebellious condition in Vermont has been little noticed in the histories of the times. See for interesting descriptions, letters and editorials in 1808, from both political standpoints, *Boston Repertory*, June 10, July 22, Aug. 26, 30; *Boston Gazette*, June 23, July 21, containing letter from Burlington denying the existence of any "rebellion"; *American Daily Advertiser*, May 18, 29, June 21, 23; *National Intelligencer*, June 27, Sept. 23; *National Aegis*, Sept. 21; *Savannah Republican*, Sept. 3, 22, 27. See also *Gallatin*, I, letters to Jefferson, May 27, Aug. 15, Sept. 9.

of evading the Embargo Laws, only in this instance, and for his own private emolument, although it may have been part of the plan to use violence, and force were actually employed against the collector or his agents to accomplish this object, but that this formed no link in a conspiracy to resist or impede the operation of these Laws within the district generally as far as their means enabled them, . . . then the prisoner is not guilty of the crime of levying war. . . . It is the intention with which resistance to the law is made, not the opposition itself, that forms the criterion; otherwise every wilful opposition to a statute would necessarily be a levying of war." [1] As a result of this case, indictments for treason became an impossible method of dealing with Embargo violations, and it evoked again a demand from the Republican press and from Republican Congressmen for further legislation expanding the crime of treason, or making seditious acts criminal.

The success of the Embargo was further impeded by a decision of Chief Justice Marshall in the Circuit Court in Virginia. Amongst the measures adopted by those States favoring the Embargo had been the enactment by Virginia and Georgia of stay-laws, in favor of debtors whose business was interfered with by its operation, postponing the collection of legal judgments by execution until six months after the repeal of the Embargo.[2] The question of the oper-

[1] *United States* v. *Hoxie*, 1 Paine, 265, Federal Cases No. 15407. See accounts of the case in *Essex Register*, Sept. 16, 1808, quoting *Bennington World* (Vt.); *Charleston Courier*, Dec. 2, 8, 1808; *Savannah Republican*, Sept. 22, 27, 1808. The *National Intelligencer*, Oct. 26, Nov. 28, said: "Judge Livingston then rose, and in a clear, concise, energetic and profoundly eloquent address to the jury expounded the law and defined the crime of treason."

[2] *Savannah Republican*, April 20, 1808; *Baltimore Federal Gazette*, June 4, 1808, giving account of the Georgia stay-law; *Connecticut Courant*, June 8, 1808, letter from Savannah, Ga., May 5: "The Legislature of this State have just passed a law to suspend all judgments during the Embargo and for six months after it is raised. It will be in vain to think of making any collections here until this law is repealed." *Ibid.*, July 6, quoting a Virginia Republican paper: "The Execu-

ation of the Virginia statute arose in the United States Circuit Court before Chief Justice Marshall, and he held, without passing on the question of its validity under the Constitution, that such a State law relative to execution was not binding on the processes of the Federal Courts, the State having no jurisdiction in such matters.[1] The result of this decision was, as was pointed out in Congressional debates on the case, to give to citizens of other States who could sue in the Federal Courts an advantage over citizens of Virginia suing in the State Courts, and to enable the law to be evaded by assignment of judgment to citizens of other States. Thus the purpose of the law to assist the operation of the Embargo was largely neutralized. As an illustration of the extent to which some of the State Courts in the South were willing to go in lightening the operation of the Embargo, it may be noted that Judge Charlton in the Superior Court in Georgia, even before the enactment of the stay-law, had issued an injunction against a sale on execution, because of the pecuniary embarrassment caused to the debtor by the Embargo Acts. This extraordinary decree he based on even more extraordinary grounds, saying: "The Nation, in order to redress itself for outrages on its sacred rights, imposes distresses on its own citizens. I shall, therefore, bottom my decision upon the abstract grounds; that cases of this description involve hardship and oppression, that they are against equity and conscience,

tive of Virginia will do well to call the Legislature together to pursue the patriotic example of the Georgia Legislature. We mean that law process should be stopped, as the only means of saving our Republican cause. . . . It would be prudent in the Supreme Executive of the United States to convene Congress in order to the passage of a law which will suspend all legal process during the existence of the Embargo."

[1] See *10th Cong., 2d Sess.*, 1597–1598, debate, Feb. 28, 1809, on the bill to provide "that the laws of the several States shall be the rules of proceedings in all judicial proceedings in the Courts of the United States." The bill failed of passage.

that they are promotive of injury to the public, that they enable monied men to accumulate usurious wealth, and that they tend to convert a just and salutary measure of the Government into an engine of political disaffection, through the medium of the policy of distressed and persecuted debtors." [1] Later, after the passage of the Georgia stay-law Judge Charlton sustained its validity, holding that it was not an impairment of obligation of contract under the Constitution, in spite of the fact that that clause had been adopted for the express purpose of preventing the occurrence of the evils produced by the State stay-laws between 1783 and 1787.[2] One further decision of the Federal Courts embarrassing the operation of the Embargo may be noted — that of Chief Justice Marshall in *United States* v. *William Smith*, in which criminal indictments for violation of one of the Embargo Acts were quashed. Marshall ruled that, as the statute contained no express criminal penalties, and as the provisions in it for forfeitures and civil fines must be regarded as the exclusive remedies intended, the Court need not decide "whether an indictment can

[1] See opinion in *Ex parte Paul Grimball*, in *American Daily Advertiser*, June 18, 1808; *Hall's American Law Journal* (1808), I, 183, and *Ex parte Maxwell*, decided April 8, 1808, in *ibid.*

[2] *Hall's American Law Journal* (1809), II, 93, opinion in *Grimball* v. *Ross*, Nov., 1808. Only five years later the Supreme Court of Tennessee in a noble opinion in *Crittenden* v. *Jones*, held a similar State stay-law enacted during the War of 1812 clearly unconstitutional, *Hall's American Law Journal* (1814), V, 520.

The following dispatch from Savannah in the *Boston Gazette*, June 9, 1808, presents an interesting commentary on the feeling aroused by the stay-law situation: "We are informed that a resolution was intended to have been introduced in the Legislature on Monday, disqualifying all persons of the profession of the law from being members of the Legislature. This was considered as a retaliating measure on the present law-members for their unanimous opposition to the bill staying sales and suspending Courts." That there were, however, many who opposed these stay-laws is seen from the *Savannah Republican*, May 3, 1809, which contained a report of the Grand Jury of Chatham County complaining of the stay-laws as in direct violation of the Constitution and of the impolicy of those measures, saying: "Unfortunately the evil does not rest on the creator alone, but is reflected by our Sister States as a stain and reproach to us."

be supported in this Court on common law principles." This decision disclosed a very singular defect existing in the four Embargo Acts of December 22, 1807, January 9, March 12, and April 25, 1808. It was not until the passage of the Enforcement Act of January 9, 1809, that indictments could be obtained for violation of the Embargo.[1]

It will be seen from the above summary that, in spite of Judge Davis' favorable opinion, the net result of the activities of the Federal Courts in connection with the Embargo had been to lessen rather than to heighten its effectiveness, and this fact served to confirm still more strongly Jefferson's personal prejudice against those Courts.

Before Congress met in December, 1808, and before Jefferson's new law for the enforcement of the Embargo was introduced, the situation in New England had become alarming. "I believe the Embargo cannot possibly be continued much longer without meeting direct and forcible resistance in this part of the country," wrote John Quincy Adams in November. "The people have been so long stimulated to this forcible resistance, and they have been so unequivocally led to expect support from the State authorities in such resistance, that I do not think the temptation will be much longer withstood. If the law should be openly set at defiance and broken by direct violence under support from the State authorities, it is to be considered how the General Government will be able to carry it through. No doubt by military execution. But that will make civil war, the very point at which the tories are driving and in the event of which it may at least be conjectured that they have already secured British support

[1] See *Richmond Enquirer*, June 2, 6, 1809; *Savannah Republican*, June 13, 20, 1809. See also Livingston, J., in *Schooner Enterprise* (1810), 1 Paine, 32.

and assistance." Joseph B. Varnum wrote from Washington: "Many have supposed that Massachusetts was on the very verge of revolt. This conclusion has been drawn from the audacious paragraphs which appear daily in the public newspapers, the seditious resolutions of County Conventions, . . . the rebellious handbills circulated in Newburyport and above all the very extraordinary statements and principles contained in the instructions and recommendations to our members in Congress by the Senate and House of Representatives. But, sir, although an occurrence of this kind would be very much lamented generally and might paralyze the exertions of some individuals, the strong arm of the Nation would soon convince the deluded projectors of their mistake. Although the Federal party in Boston seemed somewhat paralyzed on the day of the date of your letter, I learn from another source that they were about to rally, and for that purpose had called a caucus of the Junto to be held the succeeding evening for giving a tone to future proceedings. . . . Those who are not for our country are against it; and the time is fast approaching when they must, they will be designated." Joseph Story, then just elected to Congress, wrote early in January, 1809: "If I may judge from the letters I have seen from the various districts of Massachusetts, it is a prevalent opinion there — and, in truth, many friends from the New England States write us — that there is great danger of resistance to the laws, and great probability that the Essex Junto have resolved to attempt a separation of the Eastern States from the Union"; and again: "I am sorry to perceive the spirit of disaffection in Massachusetts increasing to so high a degree; and I fear that it is stimulated by a desire in a very few ambitious men to dissolve the

Union. I do believe that nothing would be so disastrous as such an event. With the destruction of the present confederacy would come the destruction of liberty. . . . I am, from principle, a sincere lover of the Constitution of the United States and should deplore, as the greatest possible calamity, the separation of the States." [1]

Whether New England was in fact ready to resist by force, to the extent of separation from the Union, is an unsolved question in history. But that the private and public sentiments of many of its leading politicians were tending in this direction, and that many of its newspapers were advocating resistance and Nullification cannot be doubted. New England had become the seat of the most extreme State-Rights doctrine. Every attack which Virginia had made, from 1798 to 1800, upon the Alien and Sedition Laws was now re-echoed in Massachusetts and Connecticut. The most radical doctrines advanced in the Virginia-Kentucky Resolutions of 1798–1799 were adopted and strengthened. Jefferson's own arguments as to the rights of a State and of the people to disregard unconstitutional laws were now turned against him. "Such laws cannot be regarded as laws; they have no force or obligation whatever; men are bound to resist all unjust extensions of power; the Constitution is a treaty of alliance and coöperation," wrote "Hampden" in the

[1] *J. Q. Adams Writings*, III, letter to E. Bacon, Nov. 17, 1808; *William Eustis Papers MSS*, letter of Dec. 5, 1808; *Story*, I, 174, 177, letters of Jan. 4, 9, 1809. Judge Richard Peters of Pennsylvania, a strong Federalist, wrote to Timothy Pickering, Dec. 3, 1809: "I confess I have been apprehensive; yet on the whole my confidence in the good sense and patriotism of the Eastern people predominated over my fear. Many here were more alarmed on this score than I have been, conscious of the peculiar irritations and oppression produced in those of your section of the Union by the embargo and its attendant scourges. The conversation at tables and public places at Boston held by men not of the mob, and the unjustifiable acts of the latter, as well as of those who would wish to be thus classified, are and have been very unpleasant to those who wish the Constitution preserved." *Documents Relating to New England Federalism* (1877), by Henry Adams.

Columbian Centinel; and replying to a Republican charge that the Federalists favored three things — a separation of the States, the reëstablishment of the Adams Judiciary system, and an alliance with Great Britain — the *Boston Gazette* made the following startling admission: "We are ready for separation, if our independence cannot be maintained without it. We know and feel our strength, and we will not have our rights destroyed by the mad schemes of a Virginia philosopher. We *will* enjoy our birthright, commerce"; but it added, with more right on its side: "We do indeed wish to see the Judiciary truly wise . . . we wish to see it a shield of protection to our citizens of every class high and low, and we dread the encroachments of the Executive will, which sets aside the decision of Judges by his veto. We do indeed rely on a Judiciary which shall protect us from laws not warranted by the Constitution, and from tyrannical acts to enforce such laws. Give us this protection, and we care not how many, or how few Judges, or whether they are of one party or the other. We do not want alliance with England." [1] Timothy Pickering wrote: "How are the powers reserved to the States respectively, or to

[1] *Columbian Centinel*, Sept. 7, 10, 13, 1808; *National Aegis*, Sept. 28, 1808, referring to articles by "Falkland": "Abominable essays insidiously preparing the people for a separation of the States"; *Boston Gazette*, Sept. 12, 1808; *National Aegis*, March 29, 1809, quoting Federalist newspapers, in reply to the defiance of the *Gazette* to show any articles advocating or threatening dissolution of the Union; *Savannah Republican*, Nov. 15, 1808, quoting *Independent Chronicle's* summary, saying: "The foregoing extracts prove beyond the possibility of a doubt that there is a party existing in the country who are desirous to dissolve the National Confederacy and to produce a separation of the States."

On the other hand, George Cabot (one of the Essex Junto) wrote to Timothy Pickering, Oct. 5, 1808: "I have seen from several quarters letters expressing apprehensions that a disunion of the States is meditated by the Federalists. Some Federalists have been made to believe there was foundation for these insinuations, and the Democrats in the Southward are using this story to deter men from acting with the Federalists. I think, therefore, it will be well to pass some very decided resolutions, as to the importance of maintaining the Union inviolate under every trial, etc." *Life and Letters of George Cabot* (1877), by Henry Cabot Lodge.

the people, to be maintained but by the respective States judging for themselves and putting their negative on the usurpations of the General Government?"[1]

When Congress met, and the debate began on Jefferson's new Enforcement Law, introduced into the Senate by William B. Giles of Virginia, the utterances of New England's representatives became even more those of Nullification. The proposed statute, which vested collectors with power to refuse clearances at their discretion, provided new rights of search and seizure and authorized the President to use the army and navy, was attacked with the greatest violence. It was termed "the bowstring discipline of a Turkish despotism", "fatal to the liberties of the people", "a hideous exhibition of military despotism", "a contest between liberty and tyranny", "subjected to the will of a military dictator."[2] "I consider this to be an act containing unconstitutional provisions, to which the people are not bound to submit and to which, in my opinion, they will not submit," said Senator James Hillhouse of Connecticut. "I do believe that it is not only justifiable but a paramount duty to resist, whenever the oppression becomes intolerable, or unconstitutional measures which strike at the foundation of civil liberty are attempted to be enforced," said Senator James Lloyd of Massachusetts. These utterances on the floor of the Senate were clearly those of sedition.

[1] *Documents Relating to New England Federalism*, letter of Pickering to Christopher Gore, Jan. 8, 1809.

[2] *10th Cong., 2d Sess.*, speeches in the Senate of Chauncey Goodrich of Connecticut, Dec. 17, 1808, Lloyd of Massachusetts, Dec. 17, 1808, Feb. 21, 1809, Hillhouse of Connecticut, Dec. 21, 1808, Jan. 7, 1809, Philip Reed of Maryland, Jan 7, 1809. Senator James A. Bayard of Delaware said, Feb. 14, 1809: "We al know that the opposition to the Embargo in the Eastern States is not the opposition of a political party or of a few discontented men, but the resistance of the people to a measure which they feel as oppressive and regard as ruinous."

See editorial in the *American Citizen*, Jan. 24, 1809, denouncing speeches of this kind and stating that there should be a law making them criminal.

In the House, similar radical sentiments were expressed.[1] Among the most violent of the Federalist leaders was Josiah Quincy of Massachusetts. "You cannot enforce it for any important period of time longer," he said. "I mean not to intimate insurrection or open defiance . . . although it is impossible to foresee in what acts that oppression will finally terminate. . . . But there is another obstacle to a long and effectual continuance of this law — the doubt which hangs over its unconstitutionality." While admitting that it had already received the sanction of the Judiciary, and while stating that he honored that tribunal and revered the Judge, yet, he argued: "Continue these laws any time longer and it is very doubtful if you will have officers to execute them, juries to convict, or purchasers to bid for your confiscations." To such a plain advocacy of resistance, Ezekiel Bacon, a Republican Congressman from Massachusetts, replied that he had not expected to hear the law called unconstitutional, "after this question had once been submitted to the decision of that tribunal whose judgment that gentleman and his friends had been heretofore so much in the habit of respecting, and when after a solemn argument an opinion sanctioning their constitutionality had been given, upon great deliberation and advisement, by a Judge of great legal weight and personal respectability and

[1] *10th Cong., 2d Sess.*, speeches of Quincy, Nov. 28, 29, Dec. 7, 29, 1808, Jan. 25, 1809. John Quincy Adams agreed with Quincy that the law probably could not be executed longer and that the new law could not be executed at all. Writing to Joseph Andrews, Dec. 15, 1808, he said: "It is my clear opinion that it will not be executed in this quarter of the Union by the ordinary process. Juries, Judges and militia will all fail to perform their parts and the bayonet will be as ineffectual to execute the law as the rest." To Ezekiel Bacon, he wrote, Dec. 21, 1808: "The law will not be executed. It will be resisted under the organized sanction of State authority. Already, notwithstanding the decision of the District Judge on the constitutionality of the existing laws, the juries will not convict for violations against them. Constitutional objections will occur with tenfold greater force against the contemplated laws, and you will soon find State Judges undertaking to decide these questions in their way."

whose opinion, from his known political character, could not be suspected of any party views." Particularly did he not expect to hear these attacks "from a quarter where we have been accustomed to hear the doctrine that the judicial power was supreme, controlling not only the exercise of individual rights but also the power of every other branch of the Government." Yet now we are threatened, he said, "by an appeal to the people over the heads of the whole Government." [1] And Gurdon Mumford of New York also replied that he could not help regretting "when a gentleman from the Eastern country told us that our laws could not be executed. . . . I trust in God that the laws can be executed, that there is patriotism enough to insure the execution. . . . If any portion of the people should attempt to prevent the execution of the laws, I think there is power enough to put them down." To this, Quincy retorted that he had not threatened any appeal to the people over the heads of the whole Government or forcible resistance. But a month later, he openly announced that resistance might be the only remedy: "New England is in a state of excitement under the operation of the Embargo Laws — Laws which some of the wisest men and best patriots in the country deem unconstitutional, and so much so that they cannot submit to them. . . . Suppose it to be the case that this House shall ever pass an unconstitutional law. What must be the course of the people? They can pursue no other mode than a constitutional remonstrance; and if that fails, they have no other resource than a constitutional resistance. . . . When a law is passed by which in the opinion of the people their interests are entirely destroyed, the law cannot be enforced." Such a doc-

[1] Speeches of Bacon, Nov. 29, Dec. 7, 30, 1808, Jan. 20, 25, 1809, Mumford, Dec. 3, 1808, George W. Campbell of Tennessee, Dec. 6, 1808.

trine was of course a plain denial of the supremacy of the Courts, and was denounced as such by Quincy's Republican opponents, both in Congress and in the press. "Mark the confession," said the *National Aegis*. "This same point has always been maintained by Republicans and strenuously controverted by Federalists. How often have they told us that the Judiciary had an inalienable prerogative to judge upon the constitutionality of legislative acts. How often have the hosts of Federalist lawyers endeavored to sanction it by their opinions! How eagerly did they press this subject at the late Court in Salem; and now we are assured by this great constitutional organ that all these pretences were false and that the Judges have no right to say whether or not the Embargo is constitutional. This much for consistency!" [1]

Other Congressmen were even more explicit than Quincy in asserting the absolute right of the State to judge of the constitutionality of the law and to refuse to obey its unlawful provisions. In support of their contention, they expressly cited the most extreme of the Virginia-Kentucky Resolutions of 1798–1799 and the action of Virginia in relation to the Sedition Act.[2] "Why should not Massachusetts take the same stand, when she thinks herself about to be destroyed? Human nature is the same throughout the United States," said Barent Gardenier of New York; and Samuel W. Dana of Connecticut advocated the following extreme, almost seditious, extension of the State-Rights doc-

[1] *National Aegis*, quoted in *Essex Register*, Dec. 17, 1808; *Aurora*, Dec. 20, 1808. The *Independent Chronicle*, March 13, 1809, said: "The Federalists heretofore considered the Judiciary the only department to decide upon the constitutionality of laws, and yet, notwithstanding Judge Davis had solemnly decreed that the Embargo Law was constitutional, they have continued to denounce it as unconstitutional."

[2] *10th Cong., 2d Sess.;* speeches in the House of Gardenier, Jan. 20, Dana, Feb. 2, Gholson, Feb. 2, Jackson, Feb. 6, 1809.

trine. While stating that he utterly disclaimed the doctrine of secession and dismemberment, he nevertheless said: "If any State Legislature had believed the Act to be unconstitutional, would it not have been their duty not to comply with its unconstitutional provisions? . . . I consider that the State Legislatures, whose members are sworn to support the Constitution, may refuse assistance, aid or coöperation as to an Act of Congress which they sincerely believe to be unconstitutional. And one step further, I think may be admitted. They may refuse the coöperation of persons holding offices as agents under the State. If we admit all these principles, gentlemen need not suppose that they in the least endanger the Constitution of the Union." To such sentiments advocating State resistance and relying on Virginia's precedent, Congressmen from that State pointed out very truly that Virginia had obeyed the Sedition Law, even though protesting its invalidity. "There never was a more splendid and memorable triumph of law over public feeling than in the trial of Callender in 1800. There where everyone around the Court execrated the law, we saw its authority supported. . . . What did the people of Virginia do? They saw one of their citizens go into a dungeon, by virtue of an Act which they deemed to be oppressive and contrary to the spirit of the Constitution. They disdained to oppose the execution of a law constitutionally passed and declared by the judicial authority to be constitutional," said Thomas Gholson of Virginia; and John G. Jackson stated that though he was proud to see Massachusetts "wishing to cling to the example of Virginia", all that Virginia had done in her Resolutions of 1798 was to resolve that the Constitution had been violated, and that the States who were parties to the compact be invited to

coöperate in constitutional efforts to procure a repeal of the law. "No man raised a hand to resist the law. . . . There can be no doubt that the States who are parties to the compact can interpose, and by uniting their efforts procure a repeal of laws violating this compact; but the course of wisdom is to do so calmly and dispassionately, as we proposed, not by a seditious and rebellious resistance."

"Things turned Topsy Turvy — Federalists turned Anti-Federalists — The Friends of Order turned Jacobin", were the headlines used by the *Richmond Enquirer* in describing the situation; and it justly said: "If these doctrines go into effect, the chain that binds together these States will soon be dissolved. If it be at any time within the power of a State to evade the force of the General Government . . . if it be the General Government is thus compelled to consult the wishes of each State before it dares to adopt any important law, the Union of the States will be like a rope of sand. . . . The doctrine and course of the Federalists is at war with all their professions. Compare their doctrine in 1799 with their practices in 1809. Then, they protested against the interposition of the State Legislatures, and clung to the Courts of the United States as the only tribunal to try the constitutionality of a law. Now, they seem to be flying from these Courts to those very Legislatures against whose jurisdiction they have so solemnly entered their protests." [1]

[1] *Richmond Enquirer*, Feb. 4, March 24, 1809.

CHAPTER EIGHT

PENNSYLVANIA AND GEORGIA AGAINST THE COURT

1809–1810

It was with such sentiments as those of Quincy and Dana ringing through the halls of Congress and given wide circulation through the country by the newspapers, encouraging conflict between the States and the Nation, that the Court, for the second time in its history, was confronted with the possibility of a direct collision with the authorities of a State — the "incorrigibly Democratic" State of Pennsylvania. During the debates on the adoption of the Constitution in 1787–1788, the probability, or rather the certainty, of a clash between the Federal and State sovereignties had been the chief argument of the Anti-Federalists against the new frame of government. Within three years after the adoption of the Constitution, the case of *Chisholm* v. *Georgia* had presented the issue in a grave form. Since then, the Court had been fortunate enough to escape the necessity of a decision involving friction with a State. The Twenty-Fifth Section of the Judiciary Act authorizing appeals on writ of error to State Courts had always been regarded as the probable source of trouble; and the Court had been extremely careful to avoid taking jurisdiction under this Act, wherever it could be avoided. As an illustration of its caution, it had even hesitated in a case in which it would seem that there ought to have been no doubt whatever — *Mathews* v. *Zane*, 4 Cranch, 382, in 1804, — a suit between two citizens of

Ohio claiming land under a Federal statute, which came to the Court on writ of error to the Ohio Supreme Court. As the case involved a construction of Federal law, it was clearly within express scope of the Judiciary Act; but counsel arguing against the jurisdiction urged that the power of revising decisions of State Courts was given merely to maintain the authority of the Federal laws "against the encroachments of State authorities . . . to prevent them from being frittered away by State jealousies and State powers", and that this situation did not arise in a case between two citizens of the same State claiming under the same Federal statute. The Court (as the Reporter stated) "at first hesitated as to the jurisdiction", but finally Marshall declared it to be the opinion of the majority that the Court had jurisdiction, as the Judiciary Act "intends to give this Court the power of rendering uniform the construction of the laws of the United States, and the decisions upon the rights or titles claimed under those laws." Later, however, at the critical period of the Embargo, which has just been described, the supremacy of the Federal Government and of the Federal Court was seriously and dangerously challenged by the State of Pennsylvania in two cases then pending. Opposition to the Federal Government had been a somewhat leading feature of the history of that State ever since 1789. In 1794, the Whiskey Insurrection had been fostered in it; the leading cases of breaches of neutrality arose there; it constituted one of the strongest hotbeds of Anti-Federalist opposition to President Adams' measures; in it occurred the so-called Fries Rebellion and trials for treason; its editors were leading violators of the Sedition Law. In 1798, the Chief Justice of the Pennsylvania Supreme Court, a leading Anti-Federalist, had questioned the authority of the Federal Judiciary in *State* v. *Cobbett*, 3 Dallas,

467, though his decision had never been brought before the United States Supreme Court for review. This early challenge had arisen as follows. At a time when the political contest between the Federalists and Anti-Federalists was at its height, and when the newspapers teemed with virulent libels of each party on the other, William Cobbett, one of the most venomous of the Federalist editors, had been indicted for libel in a State Court of Pennsylvania; having broken his recognizance and being sued by the State for debt, he sought, as an alien, to remove the case into the United States Circuit Court under the provisions of the Federal Judiciary Act; Chief Justice McKean (a bitter Anti-Federalist) in refusing the right to remove had denied that under the Constitution the right could be given, and had controverted the power of the Federal Court to adjudicate, in case of difference of opinion between the State and Nation as to the meaning of a law; he had asserted the extreme State-Rights theory that the Constitution was a "league or treaty made by individual States, as one party, and all the States, as another party", that just as when two nations differed as to the meaning of a treaty, it must be adjusted by negotiation, mediation, arbitration or the fate of war, so each State must have a right to retain its own interpretation of the Constitution, and that "there is no provision in the Constitution that in such a case the Judges of the Supreme Court of the United States shall control and be conclusive; neither can the Congress by a law confer that power. There appears to be a defect in this matter; it is a *casus omissus* which ought in some way to be remedied . . . The remedy must be found in an Amendment of the Constitution." Such a doctrine had been but the early statement of Calhoun's Nullification theories of 1833 and of Secession in 1861; and if

the case had ever reached the Supreme Court, it must have been set aside or the United States would have ceased to be a Nation.

In 1807, the Legislature of Pennsylvania had deliberately defied the Court, and a serious conflict had only been averted by the Governor's veto. This clash had arisen over a case involving a dispute between the State and the Holland Company which had purchased large amounts of land on the frontier and had failed to make settlements as required by statute. As the lands claimed by the Company were in part occupied by other later settlers and in part contended by the State to have revested in it, an intense fight had been made in the Federal Courts, and finally an action of ejectment had reached the Supreme Court. There, after elaborate argument by Alexander J. Dallas, Edward Tilghman, Jared Ingersoll and William Lewis for the company against Joseph B. McKean and William Tilghman representing the State's interests, it had been determined adversely to Pennsylvania in *Huidekoper's Lessees* v. *Douglass*, 3 Cranch, 1. Thereupon, the Legislature passed a resolution that it deemed the State the real party to all suits affecting these lands and that it "solemnly protests against and positively denies the right of any Court of the United States to take cognizance of or exercise any jurisdiction touching any suit or action brought or that may be brought." This resolution went farther than even Thomas McKean (who was then Governor) himself was prepared to go, and he vetoed it, stating that in view of the Supreme Court decision, "a just sense of law and order would seem to prescribe an acquiescence in that judgment. . . . That the declaration of a legislative opinion on the part of the State . . . in direct opposition to a judicial decision on the part of the United States is in itself so extraordinary, either as an instru-

ment of advice or intimidation, and in its consequences must either be so abortive or so injurious, that I deem it a duty, not only to my reputation, but to my country's peace and happiness, to afford the opportunity of these objections for solemn reconsideration." [1] That the resentment of the Legislature over the decision was somewhat justified seems clear, as the Court had adopted an exceedingly strained construction of the statute.[2] And McKean's views of the right of the Legislature to declare its sentiments were not shared by the Republicans in general. "The Federal Courts prostrated the sovereignty of Pennsylvania at its feet by a sophistical construction of the Constitution. The State, disposed to assert its legitimate rights, protested against judicial usurpation. . . . The Constitution of the United States protects against the suability of States. By a hocus-pocus trick of a Federal Court, Pennsylvania is sued. She protests through her representatives the violation of her rights. Is there to be no remedy for a State against the unconstitutional exercise of power by a department of the General Government?" wrote one Republican.[3] The next year, one of the leading supporters of State Supremacy, Simon Snyder, being elected Governor, the Legislature of 1809 proceeded to issue a further challenge to the United States Supreme Court and to deny its authority in two cases then pending. The first of these was the case of *Miller* v. *Nicholls*, in which in 1805 the State Supreme Court had decided against the claim of the United States Government on

[1] *Papers of the Governors of Pennsylvania* (1900), Series 4, veto of March 31, 1807; see also Message of Gov. McKean, March 18, 1805, transmitting reports of the State's attorneys on the result of the suit.

[2] For a description of the speculative operations in land by the Holland Company, see *History of the Supreme Court* (1912), by Gustavus Myers, 114, 167-169, 248-252.

[3] As to the Republican attitude, see letter to Charles W. Hare, *Aurora*, Oct. 6, 1808.

the following facts. Nicholls, a former State official, had had his accounts settled by the State Comptroller in 1798 and a judgment entered against him for $9,987. Under a law of the State enacted in 1785, the Comptroller's settlement gave the State a lien on her debtor's property. Nicholls later became a Federal revenue collector and was found in default to the United States, which sued on a mortgage of his property, recovered judgment in the State Court, and levied execution. The money, $14,503, was paid into the custody of the State Court Clerk. The State Attorney thereupon moved that it be turned over to the State Treasury; the United States Attorney, Alexander J. Dallas, contended that under a Federal statute, the United States was entitled to priority in payment over all other persons from all property owned by its debtors. The State earnestly argued that this statute only gave priority to "persons" and could not apply to a sovereign State, and that if it did so apply it was unconstitutional. It is interesting to note that Dallas, Jefferson's Republican appointee, admitted in his argument, only two years after the decision in *Marbury* v. *Madison*, that "the authority and legal right of the Court to declare a law of this State or of the United States to be unconstitutional *is not doubted*, but it must be on the clearest and plainest grounds, not on the ground of expedience." [1] The State Court determined that Pennsylvania was entitled to the money, ordered it to be paid into the State Treasury, and held that the United States priority statute should be construed as inapplicable, and they further intimated that they would be prepared to hold it unconstitutional. "Congress have the concurrent right of passing laws to protect the interests of the Union as

[1] See *United States* v. *Nicholls* (1805), 4 Yeates, 251, 255; see *Miller* v. *Nicholls* (1819), 4 Wheat. 311.

to debts due to the Government of the United States arising from the revenue," said Judge Yeates, "but in so doing they cannot detract from the uncontrollable power of individual States to raise their own revenue, nor infringe nor derogate from the sovereignty of any independent State." This contention, it is to be noted, had already been controverted and denied by Chief Justice Marshall in a case arising under the priority statute and decided in 1804, *United States v. Fisher*, saying: "This claim of priority on the part of the United States will, it has been said, interfere with the right of the State Sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers. *But this is an objection to the Constitution itself.* The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends." It appears that although Marshall's opinion had been rendered a year before, it had not been published or communicated to the Pennsylvania Judges.[1] From the decision of the State Court, the United States, after a lapse of four years, took an appeal by writ of error to the United States Supreme Court, which was filed in 1809; and that Court took the somewhat extraordinary step of issuing a citation to the Governor and Attorney-General of Pennsylvania (though the State was not in any way a party to the suit) notifying the State to appear, if she thought fit, and become a party to the suit, and to bring into question the State's right to re-

[1] See Brackenridge, J., in *United States* v. *Nicholls*, 4 Yeates, 251: "I wished to have seen the opinion of Judge Washington in the case of *United States* v. *Fisher* and others, and also that delivered as the opinion of the majority of the Judges of the Supreme Court, and to have compared both opinions with the Constitution and the Act of Congress. I have had no such opportunity and therefore have made out no regular opinion."

tain its lien. This action violently aroused the Pennsylvania Legislature, which was strongly Republican in politics. A truculent set of resolutions was introduced, which recited that: "It is inexpedient for this Commonwealth to appear or become a party to the said suit or in such manner to permit her right aforesaid to be questioned, declaring at the same time a firm determination to support the Constitution of the United States, and to submit to all lawful powers and authorities derived therefrom, but conceiving that this Commonwealth has never surrendered to the General Government a power to defeat or destroy her right to enforce the collection of her own revenues, without which power she could not exist as a sovereign State, and not being willing to ascribe to the Federal Court, by mere implication, and in destruction of such pre-existing right of the State Government, a power which would involve such a consequence." These resolutions provided: first, that the Clerk of the Court should be required to pay the money into the State Treasury; second, that "the Governor be authorized and required to protect the just rights of the State in respect of the premises, by such means as he may deem necessary for the purpose, and also to protect the person and property of the said [Clerk] . . . from any process whatever which may issue out of the Supreme Court of the United States in consequence of his obedience to the requisition and injunction of this Act"; and third, that the Secretary should transmit a copy of this Act to the Judges of the United States Supreme Court.[1] This legislation was enacted, February 1, 1809, after striking out the last two provisions, which the newspapers termed "the warlike sections." But even with this elision, the action of the Legislature was in direct defiance of the Federal Court, since it took possession of

[1] *American Daily Advertiser* (Phil.), Jan. 28, 31, Feb. 4, 1809.

the controverted fund, pending decision on the writ of error. "The conduct of our Legislature at Lancaster is very strange and may be very mischievous," wrote United States Attorney Dallas to United States Attorney-General, Caesar A. Rodney. "They have prostrated the constitutional barrier between the Judicial and Legislative departments. The Legislature at Boston will probably attempt to prostrate the barrier between the State and Federal Governments. . . . The times are bad."[1] Just at this serious juncture in the relations of the Federal and State Governments, and at the time of the most violent attacks upon the Federal Embargo Act in the New England States and in Congress, an even more dangerous clash occurred between the Pennsylvania and the United States officials, in a dispute which had been in existence between the two sovereignties for about twenty-five years. During the Revolution, a sea-captain named Olmstead had secured a judgment in the old Federal Court of Appeals in a prize case, *The Sloop Active*, decreeing to him the proceeds of the sale of a prize, against a claim set up by the State of Pennsylvania. The State had refused to recognize the authority of the Court, and declined to comply with the decree, or to allow Olmstead to receive the proceeds of the sale of the vessel, which had been deposited in the personal custody of the State Treasurer. The case had slept for fifteen years, until, in 1803, Olmstead sued in the United States District Court in Pennsylvania, sitting in admiralty, and Judge Peters had decreed that the funds be paid to Olmstead. Thereupon, Governor McKean transmitted the proceedings to the Legislature, stating that, though the whole process should be considered *coram non judice*, since the actual party involved was the State which could not be

[1] *Caesar A. Rodney Papers MSS*, letter of Feb. 6, 1809.

sued, "resistance would be extremely disastrous." The Legislature, however, at once passed a statute defying the District Court's decree as a usurpation of jurisdiction, and requiring the funds to be paid into the State Treasury, and directing the Governor "to protect the just rights of the State from any process issued out of any Federal Court." This challenge to the power of the Federal Judiciary in 1803 met the approval of the Republican papers; and the *Aurora*, inveighing against "the incipient encroachments of the Judiciary", said: "The people ought ever to be aware that the grand object of modern Federalism is to lessen and encroach upon the authority of individual States, and that the movements of the Federal Courts having this tendency ought to be regarded with a very jealous eye. . . . If the Federal Courts, under the insidious cover of legal forms and technical decisions, can legislate for the separate States, or set aside their legislative acts, or bring State independency under the control of jurisdiction, the spirit of the Union is destroyed and the liberties of the people will be brought to the footstool of aristocracy."[1] As this editorial appeared just after the decision in *Marbury* v. *Madison*, and just at a time when the impeachment of Judge Peters was being freely discussed, in combination with the proceedings against Judge Chase, the former showed his weakness by refraining to make any order to carry his decree into effect. For five years the matter lapsed, until, in 1808, Olmstead, then a war veteran of eighty-two years of age, applied to the Supreme Court for a mandamus against the Judge. In 1809, the case was argued by Attorney-General Caesar A. Rodney, William Lewis, and Francis Scott Key against John Sergeant—*United States* v. *Judge Peters*, 5 Cranch, 115. On February 20, 1809, Chief Justice Marshall rendered

[1] *Aurora*, April 11, 1803.

an opinion sustaining the Federal power and ordering a mandamus to issue to carry the former decree into effect. The delicacy of the case, involving the action of the State Legislature, was fully realized by the Court; and Marshall stated that it had considered the facts "with great attention and with serious concern"; but he added solemnly, since the State had passed a law directing its officials to disregard "any process whatever issued out of any Federal Court" the Court was forced to act for the protection of the National supremacy. "If the Legislatures of the several States may, at will, annul the judgments of the Courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the Nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other State, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves." As has been recently said, "these clear strong words were addressed to Massachusetts and Connecticut no less than to Pennsylvania."[1] He closed by saying that: "It will be readily conceived that the order which the Court is enjoined to make by the high obligations of duty and law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed." This opinion was published in full in most of the leading newspapers.[2]

As soon as the decision was announced, the Republican Governor of Pennsylvania sent a message to the Legislature at Lancaster, on February 27, stating that he in-

[1] *Marshall*, IV, 20.

[2] See among others, *American Daily Advertiser* (Phil.), March 2, 1809; *Gazette of the United States*, March 2, 1809; *Savannah Republican*, March 21, 1809.

tended to call out the militia to prevent any enforcement of the Court's decree, and asking for legislation, though "the execution of this law may produce some serious difficulties as it respects the relations between the State Government and that of the United States." [1] This message came just at the time when the Republican newspapers were filled with descriptions of the rebellious conditions in New England; and the *Aurora*, which hitherto had been a staunch State-Rights organ, now reversed its position and refused to support rebellion in Pennsylvania against the Court and the Republican administration in Washington, saying: "It seems as if infatuation and folly had become epidemic at Boston and communicated its infection to Lancaster. . . . The laws of the United States are also part of the laws of this Commonwealth, and the decisions of the Supreme Court of the United States are and must be a paramount authority to any such law. . . . Lamentable indeed is the state of morals and justice in society, when such transactions as have been exhibited in Massachusetts and in Connecticut, and now in the case of Olmstead can occur." [2] The chief Federalist paper in Philadelphia viewed the Governor's action as an indorsement of the revolt of New England Federalists, saying: "After having ordered out the militia to oppose the United States officials, I trust we shall not hear poor Massachusetts so abused for merely complaining when

[1] *Aurora*, Jan. 31, Feb. 9, 15, March 2, 3, 1809; *American Daily Advertiser*, March 1, 2, 14, 17, 20, 22, 23, 1809; *Gazette of the United States*, March 2, 1809, containing the orders of Gov. Snyder to Gen. Bright of Feb. 27, and the report and resolutions introduced into the Legislature challenging the action of the Court.

[2] The *Aurora* was attacked by other Republican papers who claimed that its position was due to a personal political quarrel of its editor, Duane, with Gov. Snyder. See *Philadelphia Press*, quoted in *New England Palladium*, April 28, 1809: "He (Duane) forgets the columns of his paper that deprecated the usurpation of the Judges and the importance of maintaining the sovereignty of the States against their encroachments. He forgets his philippics against Judge Marshall in the case of Burr." *American Citizen*, March 2, 9, 14, 1809.

the very existence of her commerce and prosperity is threatened"; and three days later, saying: "The Governor has ordered Gen. Bright out. . . . Orders are given to avoid force and bloodshed unless compelled by the necessity of the case. The marshal must recede or woe betide him." Another stated its fear that "serious consequences will result from the collision." In other parts of the country, there was general anxiety and alarm. "Had a message like this come from a New England Governor, the cries of treason and rebellion would have filled every Democratic paper in the land," said a Federalist paper in New York. "We anxiously wait to see how this will end. Whether the United States or the State will give way remains to be known," said a Boston paper.[1]

The adoption by the Legislature of resolutions denying the power of the Court to adjudicate on the rights of the State called forth further denunciation from a section of the press of both parties, and a radical Republican paper in New York voiced these views: "The Legislature of Pennsylvania asserts that when the sovereignty of one of the States is encroached upon by the National Government, it becomes the duty of the offended State to resist with arms the encroachment. The Legislature admits no umpire between the State and the National Government. They will be their own judges in their own case. They set at defiance the decisions of the Supreme Court of the Union. In these respects Pennsylvania has transcended Massachusetts. . . . If such opinions are to prevail and to be enforced by arms we may have 17 States but we cannot have a Supreme National Government." [2]

The rebellion now developed rapidly. On March

[1] *New York Commercial Advertiser*, March 2, 1809; *Columbian Centinel*, March 8, 1809.

[2] *American Citizen*, March 24, 1809.

24, Judge Peters, in conformity with the mandate from the Court, issued process against Mrs. Sergeant and Mrs. Waters (executrices of the former State Treasurer, Rittenhouse) who were retaining the fund involved from its adjudicated owners. The United States marshal in attempting to serve process was met with armed resistance by the State troops who surrounded the Rittenhouse mansion, and, thereupon, summoned a posse of two thousand men. The Federal Grand Jury indicted Gen. Bright for resisting the laws of the United States and his arrest was ordered.[1] "The great evil of this case is the impression it must make abroad, and the handle it must afford to disaffection in other parts of the Union. The question is, however, so important to the public safety and to the security of the federation of the States that it requires to be settled," said the *Aurora*. "This issue is in fact come to this: whether the Constitution of the United States is to remain in force or to become a dead letter. The plain question is, shall the laws of the Union be violated or maintained? We have heard much talk about the independence of the Judiciary, from those who wish to create a tyranny under the name of that independence . . . but here is a point at which the independence of the Judiciary, in its strict and constitutional sense, exists and demands to be supported and maintained, and in which it must be maintained, or there is an end to government. . . . The decree of the Court must be obeyed." This was strong language from a paper which hitherto had been the foremost opponent of the Federal Judiciary.

[1] *Aurora*, March 28, April 6, 13, 17, 20, 1809; *American Daily Advertiser*, March 29, 30, 31, 1809; *Gazette of the United States*, March 27, 1809. For interesting dispatches regarding the progress of this case, see *New England Palladium*, March 14, 24, 31, April 18, 1809; *Connecticut Courant*, March 15, 22, 29, April 5, 12, 19, 1809; *New York Commercial Advertiser*, April 5, 6, 11, 12, 14, 17, 29, May 2, 3, 4, 6, 1809; *New York Evening Post*, March 27, 28, 30, April 4, 14, 19, 20, May 4, 1809; *Savannah Republican*, March 21, 25, April 6, 15, 22, May 4, 8, 1809.

There was a portion of the Republican press, however, which sympathized with Pennsylvania's attitude and believed that the importance of the episode was being "magnified beyond its true dimensions and is eagerly seized in some sections of the Union as indicating a deliberate intention of the Legislature of a powerful and respectable State to unfurl the banner of insurrection against the legitimate authority of the Union. Nothing can be more unjust." One paper, the *National Intelligencer*, attributed the misrepresentation to be "the off-spring of the ignorance or malignity of the Essex Junto (in Massachusetts), who seek an apology for their own conduct in that of others, although dictated by very different motives. The Essex Junto have harbored a deadly hostility to the Administration and cherished the purpose of dividing the Union. . . . On the other hand, the State of Pennsylvania has always gloried in the Union. . . . Whatever *errors* may have crept into the proceedings of her Legislature can only be ascribed to an honest difference of opinion in a case certainly not destitute of difficulty." [1] Another prominent Republican paper said: "The opposition papers make no little noise about what they term an insurrection in Pennsylvania. . . . It is to be wished that certain other States had shown no stronger symptoms of rebellion than this great and respectable State has done." To this, the Federalist papers retorted, deploring the inconsistent position of their opponents [2] and saying: "The Democratic papers have taken very little notice of this opposition to the laws of the United States by force of arms, but their railings and denunciation at the constitutional measures adopted in the Eastern States by

[1] *National Intelligencer*, March 31, 1809; *National Aegis*, April 12, 1809.

[2] *Columbian Centinel*, April 15, 1809; *New England Palladium*, March 31, 1809; *New York Commercial Advertiser*, March 28, 1809; *New York Evening Post*, April 14, 1809.

petition and remonstrance will be long held in remembrance." "Democracy in an Old Character or Pennsylvania resisting the United States" was the comment of another. "The rebellion in Pennsylvania is assuming a more dangerous and threatening aspect," said another, which stated that the description of Gen. Bright's resistance "will excite the regret and indignation of all who regard the safety of the Union, the authority of the General Government and the honor of the country." And a New York paper launched this savage attack upon its Republican opponent: "A second time, the Democrats of Pennsylvania are embodied for the purpose of resisting the laws of the United States and thus precipitating a dissolution of the Union. Yet those who have the wicked effrontery to charge the State of Massachusetts and the Federal party in this State with a design to overthrow the Union are the only wretches in America (if we except some of the Jefferson party in Virginia) who have ever harbored the desperate design of arraying a rebellion against the government. . . . And now behold this same Democratic horde, under the direction of a Democratic Governor not three removes in understanding above Jack Cade, ordering out the force of the State in open and direct defiance of the General Government. . . . The United States must prevail, and then the Governor of the State and all who obey him will be guilty of treason and ought to be hung on a gibbet."

Meanwhile, the Legislature, alarmed at the serious crisis, debated methods of retreat. "A Cabinet council is now holding in the deeply important case of Olmstead," wrote a correspondent, March 27. "It had been supposed that the marshal, good, easy man, would make but a faint attempt to enforce the service of the process. The active attempt made by him has awakened the most

serious apprehensions. The Attorney-General is here. The voice of prudence at length is heard, and it is understood that measures will be taken to compromise matters with the much injured, old veteran." [1] On April 6, the State authorities showed signs of weakening, when Governor Snyder wrote to President Madison, transmitting to him a copy of the defiant resolutions adopted by the Legislature, containing a most extreme statement of State-Rights and Nullification. The Governor expressed the hope that the President would "justly discriminate between opposition to the Constitution and laws of the United States and that of resisting the decree of a Judge founded, as it is conceived, on a usurpation of power", and that he would be "equally solicitous with myself, to preserve the Union of the States and to adjust the present unhappy collision of the Governments in such a manner as will be equally honorable to them both." Madison, then only a few weeks in office, sent a firm reply, April 13, declining to interfere, and saying: "The Executive is not only unauthorized to prevent the execution of a decree sanctioned by the Supreme Court of the United States, but is expressly enjoined, by statute, to carry into effect any such decree, where opposition may be made to it." [2] Interesting surmise may be made whether Jefferson, had he still been President, would have taken this determined stand against a State and in behalf of the authority of the Court. The Federalists believed that he would not have done so; and one paper made the extraordinary suggestion that Jefferson himself, because of his intimate friendship for one of the executrices in the *Olmstead Case*, and because of the "inveterate hostility

[1] *American Daily Advertiser*, March 29, 1809; *Independent Chronicle*, April 3, 1809.

[2] *11th Cong., 2d Sess.*, 2269–2290. The Pennsylvania Legislature's Resolutions were transmitted by Madison to the Senate, June 11, 1809.

which he has manifested upon all occasions to the Judiciary" had probably been "instrumental in producing the present state of affairs in Pennsylvania. Had this rebellion broken out in the Presidency of Mr. Jefferson, we could not have hoped for the interference of the Executive. His hatred of the Judiciary would have preferred a seven years civil war to the triumph of law over the machinations of profligate politicians. . . . Thank God this hoary old conspirator against the fame and political life of the father of these States, the convicted traitor to the Constitution of his country, is shorn of all his power." With much reason, the Republican organ in Washington termed this effusion, "Insanity."[1]

Finding that no assistance was to be received from President Madison, and having under consideration a bill to authorize restoration of the fund, the Legislature finally decided that the State troops should be temporarily removed; and on April 15, the "siege of Rittenhouse Castle" was suspended. Mrs. Sergeant at once sued out a writ of habeas corpus before Chief Justice Tilghman of the State Supreme Court. "The question now rests upon a basis quite distinct from the rights of an injured man (Olmstead); it assumes a part more lofty and more solemn; is the Constitution of the United States anything or nothing? Shall the civil authority be overawed by military power? Is our government a government of laws or of individual caprice?" said the *Aurora*, and a few days later it expressed the following sentiments which Marshall himself could not have bettered: "Laws, and not the bayonet, ought to rule in a democracy; and common reason would have produced this solemn and irresistible conviction that on the Union of States depends the freedom and independence of this

[1] *National Intelligencer*, April 21, March 31, 1808.

Nation, and that a resistance by force of arms to the constituted authorities of the United States had an inevitable tendency to prostrate that freedom and independence, inasmuch as it tended to destroy the Union of the States." Alexander J. Dallas, the Republican United States Attorney, wrote to Attorney-General Rodney: "The marshal has taken Mrs. Sergeant and she remains in custody of his deputy at her own house, till the hearing on a habeas corpus before Chief Justice Tilghman shall be decided. . . . I have no doubt of a favorable result. Gen. Bright set off for Lancaster as soon as Mrs. Sergeant was taken. The call for the posse has been revoked. I think the money will be paid to Olmstead if the Chief Justice decides that the process is legal. There will be no military conflict. The (Federal) grand jury had no hesitation in finding a bill against Gen. Bright and his guard. Indeed, there was some doubt among them of presenting Governor Snyder. Mr. Ingersoll (fortunately for peace) is retained to assist, and he has informed me that he means to plead to the jurisdiction. . . . You will think on the subject. The object of all in office must be, I think, to assert the power and dignity of the Union, without impairing the attachment of the State to our Government and its administration." [1] Four days after the arrest of Mrs. Sergeant, Chief Justice Tilghman, on April 19, dismissed her petition for habeas corpus, holding that she was properly in the Federal custody, and concluding his opinion by expressing his "anxious hope that this long-continued controversy will be brought to a termination, without any material interruption of that harmony between this State and the United States so essential to the prosperity of both";

[1] *Caesar A. Rodney Papers MSS*, letter of Dallas, April 17, 1809, letter of Madison, April 22, 1809.

and the *Aurora* said: "The issue was such as every intelligent man expected and such as every honest man must be satisfied with." [1] Meanwhile, the Legislature had passed an act appropriating money sufficient to comply with the payment ordered by the Court, and on April 26, the Federal judgment was satisfied. "Devotion to the Constitution of the Union, reverence for the cause of justice have prevailed and triumphed over the narrow influence of official ignorance and the servility of place and corruption," said the *Aurora*. "The affair of Olmstead has passed off without the threatened collision of force," wrote President Madison to his Attorney-General. "It is bad enough as it is, but a blessing compared with such a result."

The final scene in this drama of rebellion was played before the intrepid Judge Bushrod Washington, sitting in the United States Circuit Court in the trial of Gen. Bright for resisting the laws of his country. The case aroused great excitement in Philadelphia. "Rumors, terrors and threats of every kind were put into circulation," wrote a lawyer who was present. "It was publicly proclaimed that Judge Washington would never dare to charge against the defendants, or to pronounce sentence against them if they were convicted. But the people did not know him, they were incapable of appreciating his rare moral and judicial qualities. . . . Upon the close of the speeches of the counsel, a vast multi-

[1] *New York Commercial Advertiser*, April 29, 1809; *New York Evening Post*, April 20, 1809; *National Intelligencer*, April 21, 24, 1809. The *American Citizen*, April 21, 1809, printed an amusing account of the argument before Tilghman, from a Republican point of view, stating that William Lewis' argument in behalf of the Government was made under "the tyrannic influence of petty, personal, political and party passions . . . and the successive Legislatures were covered with the slime which he deposited, as he crawled and crept over or touched upon their names or their acts"; it also stated that Jared Ingersoll's argument for the State was a "critical, luminous and impressive dissection of Chief Justice Marshall." The *Richmond Enquirer*, April 25, 1809, quoted the *Philadelphia True American* as saying: "The war in this city is at an end and tranquillity and peace again restored."

tude of auditors, and many of those who maintained that the Judge would at last shrink from a conviction, assembled in the room where the Court then sat. The argument being ended, the Judge, turning to the crier, said to him, in the mildest and most composed way: 'Adjourn the Court, to meet tomorrow morning in the room on the ground floor of this building. This is an important case — the citizens manifest a deep interest in its result, and it is but right that they should be allowed, without too much inconvenience, to witness the administration of the justice of the country, to which all men, great and small, are alike bound to submit.' "[1] When the Court reassembled, the defendants were found guilty, and the Judge in an impressive speech sentenced them to fine and imprisonment; but as the disturbance gradually died down, this sentence was within a month remitted by President Madison.[2] "Thus has terminated the third instance in that State of systematized opposition to the constituted authorities of government," said a Federalist paper in Connecticut. "The farce which has been enacting in Pennsylvania for some weeks under the management of S. Snyder has ended," was the comment in New York in both Federalist and Republican papers. That there was still a certain amount of Republican sympathy for the rebellion may be seen from a comment in a Baltimore paper, which termed its account of Gen. Bright's trial — "Sketches of the farce played before old Peters and the imbecile

[1] *The Forum* (1856), by Davis Paul Brown, I, 377–378.

[2] *Aurora*, May 2, 3, 4, 6, 9, 1809; *National Intelligencer*, May 8, 1808; *Connecticut Courant*, May 16, 1809; *New York Evening Post*, May 11, 1809; *American Citizen*, April 21, 1809. See in general, *The Whole Proceedings in the Case of Olmstead* v. *Rittenhouse* (Phil., 1809); *The Trial of General Bright in the Circuit Court of the United States* (Phil., 1809). See also *The Case of the Sloop Active*, by Hampton L. Carson, *Penn. Mag. of Hist. and Biog.* (1892), XVI; and authorities and Resolutions of the Pennsylvania Legislature of April 3, 1809, cited in *State Documents on Federal Relations* (1911), by Herman V. Ames, 46–48.

Washington, two of the usurpers"; [1] and a Philadelphia paper, in describing the throngs of citizens who surrounded the jail "in which are incarcerated the defenders of the State sovereignty", said that "it was with some difficulty that popular indignation was restrained from venting itself against those who have been the most active in prostrating the rights of the State." [2] The *Richmond Enquirer*, a Republican paper which had been opposed to the action of Pennsylvania throughout, gave the following summary of its conclusions as to situation of the Federal Courts with reference to the States: "The State Legislatures should not possess the power to arrest Federal process. . . . On the other hand, the sovereignty of the States should be guarded with the utmost circumspection. The true doctrine is this: let the decisions of the Federal Courts be paramount, but as a pledge that these decisions should not entrench upon the sovereignty of the States or the provisions of the Constitution, let the Judges be more responsible in all impeachments, let the decision be made by a majority instead of two thirds of the Senate, and at all events let the phrase 'high crimes and misdemeanors' in the Constitution be so amended as that the Judges may be impeached for those vices and heresies which Judge Chase has softened down into 'errors of opinion.'" This was the same doctrine which had been urged upon the Senate and rejected in the Chase impeachment, four years before.

These three episodes in 1808–1809 of the Johnson

[1] Another Republican paper, the *American Citizen*, May 9, 1809, quoting this from the *Baltimore Whig*, termed it "a disorganizing Jacobinical passage from that sink of imbecility and violence."

[2] *New York Commercial Advertiser*, May 6, 1809, quoting *Philadephia Press*, and saying the Court's decision ought "to have restored tranquility and silenced the spirit of rebellion . . . but the friends of Snyder and insurrection, in open contempt of the constituted authorities, meet in turbulent assemblies and threaten to prostrate the rights, laws and dignity of the Federal Government."

Mandamus, the Embargo and the Pennsylvania Rebellion have been described at length, since they afford a striking illustration of the pronounced effect upon American history and upon the American Union of the States, produced by the existence of a sturdy, independent and courageous Federal Judiciary. Without men like William Johnson, John Marshall, Bushrod Washington and John Davis, the Union might well have been in great danger in these early years. These three episodes, moreover, present an interesting illustration of the fact that, throughout American history, devotion to State-Rights and opposition to the jurisdiction of the Federal Government and the Federal Judiciary, whether in the South or in the North, has been based, not so much on dogmatic, political theories or beliefs, as upon the particular economic, political or social legislation which the decisions of the Court happened to sustain or overthrow. No State and no section of the Union has found any difficulty in adopting or opposing the State-Rights theory, whenever its interest lay that way. That the Eastern States did not become the stronghold of the State-Rights party was due, not to their attachment to Federalist political doctrines, but rather to the fact that, upon the whole, Congressional legislation (other than the Embargo) and a broad judicial construction of the Constitution favored their economic and social interests. In 1809, however, these States were more nearly prepared than were the Southern States to indorse the extreme views of Pennsylvania as to State Sovereignty. Though the Legislature of that Republican State passed a set of defiant resolutions inviting its sister States to join in favoring an Amendment to the Constitution to establish an "impartial tribunal to determine disputes between the General and State Governments", the proposal was received

with no favor, outside of New England, and resolutions of disapproval were passed by the Legislatures of Tennessee, Kentucky, New Jersey, Maryland, Ohio, Georgia, North Carolina and Virginia and even of New Hampshire and Vermont.[1]

The next Term of the Court, in 1810, was a memorable one. Though the country had quieted down from the intense excitement prevailing over the Embargo situation, and the States had somewhat relaxed their refractory attitude towards the Federal Government, the Court was confronted with two cases, both of great importance, in which the relations of the Federal Judiciary towards State Legislatures and State corporations were involved. In *Bank of the United States* v. *Deveaux*, 5 Cranch, 61,[2] the question was presented whether a corporation suing or sued in the Circuit Court of the United States (which had jurisdiction only in case of diverse citizenship of the parties) must be alleged to have all its stockholders citizens of a State other than that of the opposite party to the suit. On the decision of this case hung the important issue whether the State Courts or the Federal Courts should adjudicate in cases involving corporations having stockholders from different States. Distinguished counsel took part in the argument — Philip Barton Key, Robert G. Harper, Charles J. Ingersoll, John Quincy Adams, Walter Jones and Horace Binney (who made his first appearance in the Court). "The reason of giving jurisdiction to the Courts of the United States in cases between citizens of different States," said Adams, "applies with the greatest

[1] *State Documents on Federal Relations* (1911), by Herman V. Ames. It may be noted that, in 1810, the State of Virginia, in its reply, declared that "a tribunal is already provided by the Constitution of the United States (to wit: the Supreme Court) more eminently qualified to decide the disputes aforesaid in an enlightened and impartial manner than any other tribunal which could be created."

[2] Two other cases were argued with the *Deveaux Case*, *Hope Insurance Co.* v. *Boardman* and *Maryland Insurance Co.* v. *Woods*.

force to the case of a powerful moneyed corporation erected under the laws of a particular State. If there was a probability that an individual citizen of a State could influence State Courts in his favor, how much stronger is the probability that they could be influenced in favor of a powerful moneyed institution which might be composed of the most influential characters in the State. What chance for justice could a plaintiff have against such a powerful association in the Courts of a small State whose Judges perhaps were annually elected, or held their offices at the will of the Legislature?" [1] And Robert G. Harper said that: "One great object in allowing citizens of different States to sue in the Federal Courts was to obtain a uniformity of decision in cases of a commercial nature. The most numerous and important class of these cases, and the class in which it is most important to have uniform rules and principles, is that of insurance cases. They are almost wholly confined to corporations, though most frequently in fact between citizens of different States." The Court held, however, that the Constitution did not recognize a corporation as a citizen, and that in order to confer jurisdiction on the Federal Courts all the stockholders of the corporation must be averred to be citizens of a State other than that of the opposing party in the suit. As a result of this decision, the reports of the Supreme Court and of the Circuit Courts during the

[1] Adams wrote in his *Memoirs*, I, March 7, 1809: "The ground which I was obliged to take appeared to the Court untenable, and I shortened my argument, from the manifest inefficacy of all that I said to produce conviction upon the minds of any of the Judges."

The *Aurora*, Feb. 7, 1809, contained the following note from a Washington correspondent: "Mr. J. Q. Adams is come here to attend the Supreme Court, and a considerable number of strangers on the like business; but as people are always ready to gulp down the marvellous a thousand stories were circulated on these arrivals, something like the stories circulated at Naples when Vesuvius rumbles — the only lava running here is the froth or saliva of British corruption, with a small discolouring of domestic treason and sedition."

first forty years thereafter reveal an almost complete absence of cases in which corporations (other than banking and insurance) were litigants; and the development of a body of corporation law by the Federal Courts was postponed to a late date in their history.

While this case has been noted in the law chiefly for the technical point of jurisdiction thus decided, its real historical interest lies in a fact hitherto unnoted. The case had been intended, in its inception, as a test case on which to obtain the opinion of the Court as to the right of a State to tax the Bank of the United States. It was an action for conversion brought against a tax collector and a sheriff of Georgia, who, under the State statute of 1805 taxing the branches of the Bank, had entered its premises and carried off $2004 in silver in payment of the tax. The case, therefore, presented the precise questions which were argued and decided, ten years later, in *McCulloch* v. *Maryland* — the right of the State to tax a Federal agency and the power of Congress under the Constitution to charter the Bank. Judge William Johnson had ruled in the Circuit Court that there was not the necessary diverse citizenship to give that Court jurisdiction; but it appears that he was evidently conscious of the fact that the Bank might not be able to obtain fair treatment in the State Courts, for he said: "It is true that this view of the subject may expose this valuable Institution to some embarrassment, and it is to be regretted that it cannot be better guarded. It is to be hoped that a just and temperate idea of the true policy of the individual States, with its real and extensive importance to the Union, will always afford it ample protection. . . . We are happy in the understanding that this decision is to be reviewed in the Supreme Court. Its importance in every point of view

entitles it to the highest notice." [1] Had the Court in sustaining the jurisdiction of the Circuit Court decided the important constitutional question involved, the course of legal history would have been radically changed. *McCulloch* v. *Maryland* would have been anticipated by ten years; Congressional power to charter a bank would have been upheld; the long debates in Congress between 1810 and 1816 over this power would not have occurred; the charter of the old Bank would probably have been renewed; the tremendous difficulties in the financing of the War of 1812 would have been obviated; the feelings of State jealousy over the denial of the State powers of taxation would have been less vigorous than they were ten years later, after a series of State laws had been set aside by the Court. Truly, this decision in the *Deveaux Case* had a momentous effect, unforeseen by the Court at the time it was rendered by Chief Justice Marshall.

The other case decided at this 1810 Term, which aroused vivid and excited interest throughout the country and vitally affected the course of political and economic history, was *Fletcher* v. *Peck*, 6 Cranch, 87. Not only was this the first case in which the Court had held a State law unconstitutional, but it also involved legislation which had been the subject of bitter controversy and violent attack for over fifteen years in the State of Georgia and in the Congress of the United States. In 1795, the Georgia Legislature had granted to four land companies, the Georgia Company, the Georgia Mississippi Company, the Upper Mississippi Company and the Tennessee Company, a tract of twenty million acres (afterwards found to contain thirty-five million) for the sum of $500,000. The enactment of the statute

[1] *National Intelligencer*, July 1, 2, 1808; *Charleston Courier*, June 14, 1808; *Bank* v. *Deveaux*, *Hall's American Law Journal* (1808), I, 263.

making this grant had been so clearly obtained by fraud and bribery that the indignation in Georgia was intense; the sale was revoked by the next Legislature in 1796; the Act of 1795 was publicly burned, and all evidence of its passage was expunged from the records. The Georgia Company had meanwhile, however, sold its tract to a New England Mississippi Company composed largely of Boston capitalists, which, in turn, sold exclusively to investors in New England and the Middle States. These purchasers of land contended that the Act of 1796 could not legally annul vested titles; but Georgia insisted that titles based on the original fraudulent statute were invalid. In 1802, Georgia ceded to the United States its claim to these lands and the fight was transferred to the floor of Congress. For six years, from 1803 to 1809, the efforts of the Yazoo claimants, represented by Gideon Granger of Connecticut, then Postmaster-General, and Perez Morton, a leading Jeffersonian of Massachusetts, to secure compensation for the lands purchased by them were opposed with vituperative violence and with success by John Randolph of Virginia.[1] Finally, the claimants decided to test their rights in the Federal Courts, and a suit was arranged between a vendee and vendor of a parcel of these lands, based on an alleged breach of warranty of title. This case, *Fletcher* v. *Peck*, came first before the

[1] Relative to the facts involved in the *Yazoo Case*, see the *Yazoo Land Companies*, by Charles H. Haskins, *Amer. Hist. Ass. Papers* (1891), V; *James Wilson and the so-called Yazoo Frauds*, by M. C. Klingelsmith, *U. of P. Law Rev.* (1908), LVI; *Report on Georgia Land Claims*, *7th Cong., 2d Sess.*, 1342. See also *Brown* v. *Gilman*, 4 Wheat. 255; *Brown* v. *Jackson*, 7 Wheat. 218; *Hughes* v. *Blake*, 6 Wheat. 453.

An unsuccessful attempt to test the Georgia statute's validity by means of a suit based on warranty of title occurred in *Bishop* v. *Nightingale* at the Spring session in 1802 in the United States Circuit Court for the 2d Circuit. See *New York Evening Post*, June 30, 1802. It seems to have hitherto escaped attention. The Georgia statute was held to be in violation of the Federal Constitution by the Massachusetts Supreme Court, as early as 1799. See opinion published in *Columbian Centinel*, Oct. 9, 1799, and republished in 1917 in 226 Mass. 618, and see also *History of the American Bar* (1911), by Charles Warren, 270, note.

Court at the 1809 Term, when it was presented by Luther Martin against Robert G. Harper and John Quincy Adams; and an interesting picture of the argument and of its interruption by the inauguration of President Madison was given by Adams in his diary:

March 2. I argued the case of Fletcher and Peck, on the part of the latter, and occupied the whole day, from eleven o'clock until past four in the afternoon. I was under the usual embarrassments which I have always experienced in public speaking, and, notwithstanding all the pains I have taken, not sufficiently clear in my arrangement and method. In point of effect, I was apparently not successful, and in my exposition dull and tedious almost beyond endurance. The Court did, however, hear me through. Mr. Harper follows me tomorrow. . . .

March 3. Mr. Harper argued the case of Fletcher and Peck, on the part of Mr. Peck. He was between two and three hours. Mr. Martin then began his argument in the close and went partly through it. He is to finish tomorrow. The Court adjourned to meet at eleven o'clock in the morning.

March 4. Going up to the Capitol, I met Mr. Quincy, who was on his way to Georgetown to get a passage in Baltimore. The Court met at the usual hour, and sat until twelve. Mr. Martin continued his argument until that time, and then adjourned until two. I went to the Capitol and witnessed the inauguration of Mr. Madison as President of the United States. The House was very much crowded, and its appearance very magnificent. He made a very short speech, in a tone of voice so low that he could not be heard, after which the official oath was administered to him by the Chief Justice of the United States, the other four Judges of the Supreme Court being present and in their robes. After the ceremony was over, I went to pay the visit of custom. The company was received at Mr. Madison's house; he not having yet removed to the President's house. Mr. Jefferson was among the visitors. The Court had adjourned until two o'clock. I therefore returned to them at that hour. Mr. Martin closed the

argument in the cause of Fletcher and Peck; after which the Court adjourned. I came home to dinner, and in the evening went with the ladies to a ball at Long's, in honor of the new President. The crowd was excessive — the heat oppressive, and the entertainment bad.

March 7. In the case of Fletcher and Peck also, he (the Chief Justice) mentioned to Mr. Cranch, and Judge Livingston had done the same to me on Saturday night at the ball, the reluctance of the Court to decide the case at all, as it appeared manifestly made up for the purpose of getting the Court's judgment upon all the points.[1] And although they have given some decisions in such cases, they appear not disposed to do so now. . . .

March 11. This morning the Chief Justice read a written opinion in the case of Fletcher and Peck. The judgment in the Circuit Court is reversed for a defect in the pleadings. With regard to the merits of the case, the Chief Justice added verbally, that, circumstanced as the Court are, only five Judges attending, there were difficulties which would have prevented them from giving any opinion at this Term had the pleadings been correct. . . .

The case, thus decided on a point of pleading at the 1809 Term, was re-argued at the 1810 Term, Joseph

[1] Judge Johnson in his dissenting opinion stated: "I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights but not on the speculations of parties. My confidence, however, in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief they would never consent to impose a mere feigned case upon this Court." This phase of the case was, nevertheless, hotly attacked by Congressman Farrow of South Carolina, in a debate in the House, March 23, 1814, who said: "The case before the Court was a feigned issue made up between Fletcher and Peck, with the aid of their counsel, for the purpose of obtaining a judgment of the Court against Fletcher, the plaintiff. If the plaintiff had have gained the action, the fifty millions of acres of land would have been lost. Notwithstanding the great zeal of plaintiffs to gain their suits, they oftentimes are disappointed; but I never did hear of one who wished to lose his suit, but what he was by some means accommodated. I never did see a Judge who had talents and ingenuity enough to overrule and defeat both parties and their attorneys, and award judgment to the plaintiff, contrary to their united efforts. . . . Any honorable gentleman that will give himself the trouble to look into this case must see that the deed from the defendant to the plaintiff, which contains the covenant, the ground of the action, was a feigned deed to enable them to make up the issue. The novelty of the covenant contained in the deed is worth seeing; nothing like it has ever appeared to us before." *13th Cong., 2d Sess.*, 1896; *J. Q. Adams*, II.

Story of Massachusetts taking Adams' place as one of the counsel, the latter having been made Minister to Russia. On March 16, 1810, Chief Justice Marshall delivered the opinion of the Court, sustaining the contentions of the Yazoo claimants, and holding the Repeal Act of the Georgia Legislature of 1796 to be unconstitutional, on the ground that it impaired the obligation of a contract, so far as it attempted to annul grants of land made under the earlier statute. As this was the first case in which the Court had held a State statute to violate the provisions of the United States Constitution, Marshall, at the very outset of his opinion, made clear the attitude in which the Court approached a case of this description. "Whether a law be void for its repugnancy to the Constitution," he said, "is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. . . . It is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the Judge feels a clear and strong conviction of their incompatibility with each other."[1] The decision of the Court, that a grant made under a legislative act was a contract as that word was used in the Constitutional provision forbidding a State to impair the obligation of contracts, surprised the public in general, but not the Bar; for the leading jurists in the country had long considered the Georgia statute clearly unconstitutional. Fifteen years before, Alexander Hamilton had given a formal opinion to this effect, stating that the provisions in the Constitution forbidding impairment of obligation of

[1] The decision was published in full in many newspapers, particularly in the South. See *Richmond Enquirer*, April 5, 6, 1810; *Savannah Republican*, April 10, 12, 14, 1810.

contract "must be equivalent to saying that no State shall pass a law revoking, invalidating or altering a contract. Taking the terms of the Constitution in their large sense, and giving their effect according to the general spirit and policy of its provisions, revocation (by the State) is contrary to the Constitution and therefore null, and the Courts of the United States in cases within their jurisdiction will be likely to pronounce it so." Robert G. Harper had also given an opinion to the same effect, which had been widely circulated.[1] Notwithstanding these opinions, the decision of the Court fell with a stunning shock upon the State-Rights politicians and enhanced their hostility towards the judicial power. They failed to see that the doctrine established by the Court was, in fact, a strong bulwark to State authority; for if the Court had acceded to the contention that a State statute could be invalidated by a Federal tribunal, on allegations of fraud or bribery in its passage, a wide door would have been opened for the attack upon State legislation in countless instances in subsequent years. Against so dangerous an extension of its jurisdiction, the Court firmly set its face and said: "This solemn question cannot be brought thus collaterally and incidentally before the Court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an enquiry respecting the corruption of the sovereign power of a State"; and it pointed out further that even land titles derived by fraud were good, when set up by a bona fide purchaser without notice. Robert G. Harper, long before, had taken the same position, saying: "If the Legislature have exceeded the bounds of its authority, its acts are null; but the motives of its members can

[1] *The Yazoo Question*, by Robert G. Harper, Aug. 3, 1796; *Hall's American Law Journal* (1814), V, quoting Hamilton's opinion of March 25, 1796.

never be questioned, without striking at the root of law, and introducing scenes of confusion a thousand times more intolerable than any evils which it could be intended to remedy." It is a singular fact that the very men who have always opposed the Court's right to determine the constitutionality of statutes, have attacked the Court for failing to assume to exercise the much more extensive and the more dangerous power of inquiry whether a statute was enacted through fraud, bribery or corruption.[1] Nothing could more certainly bring the Court into violent conflict with the Legislative branch of the Government than any such judicial attempt to investigate its motives, and to set aside a statute, upon a judicial finding of corruption.

That the decision should have been received in 1810, however, with violent opposition from the Representatives of Georgia in Congress was only natural; and a furious fight raged for four years over measures introduced to compromise with the Yazoo claimants.[2] "It is a decision which the mind of every man attached to Republican principles must revolt at," said one Congressman; while another delivered a speech full of invective against the Judiciary and terming the decision as "shocking to every free government and sapping the foundation of all of our Constitutions."

The speculators had hunted up a maxim of the common law or equity courts of England, and the Judges wielded

[1] *History of the Supreme Court of the United States* (1912), by Gustavus Myers, 262, 548.

[2] *11th Cong., 2d Sess.*, April 17, 1810; *ibid., 3d Sess.*, Dec. 17, 1810, 414 *et seq.*, for debate on the measures to be taken for the Yazoo Claimants in view of the Court decision. See also *12th Cong., 2d Sess.*, 856, 1069, Jan. 20, Feb. 15, 1813; *13th Cong., 2d Sess.*, 1858 *et seq.*, March 8, 9, 15, 21, 22, 23, 24, 25, 1814.

Although the Boston newspaper, the *Columbian Centinel*, had said March 24, 1810, on the decision of the case: "This judgment will have the effect to restore to a number of our distressed fellow citizens the benefits of claims from which they have for years been unjustly debarred", it was not until the year 1814, that Congress finally enacted the bill compromising the claims by a part payment.

it for their benefit and to the ruin of the country — the maxim that third purchasers without notice shall not be affected by the fraud of the original parties. Thus, sir, by a maxim of English law are the rights and liberties of the people of this country to be corruptly bartered by their representatives. . . . It is proclaimed by the Judges, and is now to be sanctioned by the Legislature, that the Representatives of the people may corruptly betray the people, may corruptly barter their rights and those of their posterity, and the people are wholly without any kind of remedy whatsoever. It is this monstrous and abhorrent doctrine which must startle every man in the nation, that you ought promptly to discountenance and condemn. . . .

While the other States in the Union did not entertain the same resentment at the Court's decision in *Fletcher* v. *Peck* which was felt in Georgia, the fact that a law of a State had for the first time been declared invalid by the Court impressed upon the public mind the important part which that tribunal was to play in the development of the Government.

CHAPTER NINE

JUDGE STORY, THE WAR AND FEDERAL SUPREMACY

1810–1816

After the Court adjourned in 1810, it became known that Judge Cushing was dying. He was an old man of seventy-eight; he had served for twenty-one years on the Court, and for the past few years had been somewhat senile.[1] When his death occurred on September 13, 1810, the choice of his successor became a matter of National interest to the country and of political interest to the party then in power. Theretofore, except at the time of Chief Justice Rutledge's appointment, there had been little public interest in the appointment of Supreme Court Judges and almost no attention had been paid by the public press to the question. Now, however, the Federal Judiciary had become a live issue in connection with problems of the day. It was seen that the status and rights of a United States Bank in Georgia, the rights of land claimants in Kentucky and Virginia, the regulation of commerce through embargoes, non-intercourse laws, steamboat monopolies, and many other questions on

[1] For the best account of Cushing, see article by Chief Justice Arthur P. Rugg in *Yale Law Journ.* (1920), XXX; the *New England Palladium*, Sept. 18, 1810, said: "As a Judge, the deceased united the learning of the scholar with the science of the lawyer. He sought truth on whatsoever side she was to be found — alike regardless of the frowns of the great or the clamour of the many. . . . He was characterized for possessing uncommon patience of hearing, quickness of perception and deep investigation . . . ; in pronouncing the last judgment of the law his manner was peculiarly interesting and impressive."

David Howell of Rhode Island wrote to Madison, Nov. 26, 1810, that the Federalists had prevailed on Judge Cushing " to retain his office, for several years under the failure of his powers, lest a Republican should succeed him." *Madison Papers MSS.*

which political antagonisms were arising — all might be brought before the Court for final decision. On Cushing's death, the Court then consisted of three Federalists — Marshall, Chase and Washington, and three Republicans (all appointed by Jefferson) — Johnson, Todd and Livingston. The future trend of the Court's decisions might largely depend on the character of the man who should be appointed by President Madison to fill Cushing's place. Five Republicans from Massachusetts were prominently mentioned as possible nominees — Levi Lincoln (Attorney-General of the United States under Jefferson), Perez Morton, George Blake (United States Attorney), John Quincy Adams (who had recently resigned as Senator), Ezekiel Bacon (a Congressman), Joseph Story (a former Congressman, now Speaker of the State House of Representatives). Connecticut men strongly urged the appointment of Gideon Granger of that State (Jefferson's Postmaster-General). No one was more active in making recommendation to Madison for the vacancy than Jefferson himself. For the past seven years, his antipathy to Chief Justice Marshall had been growing more and more bitter. Only four months before, he had written to Madison, referring to "the rancorous hatred which Marshall bears to the Government of his country" and to "the cunning and sophistry within which he is able to enshroud himself"; and he had said: "His twistifications of the law in the case of Marbury, in that of Burr, and the late Yazoo case, show how dexterously he can reconcile law to his personal biases." [1] Moreover, there was pending in the Circuit Court at Richmond a suit brought by Edward Livingston against

[1] *Jefferson*, XI, letter of Jefferson to Madison, May 25, 1810. To John Tyler, Jefferson wrote, May 26, 1810, that in the hands of Marshall, "the law is nothing more than an ambiguous text, to be explained by his sophistry into any meaning that may subserve his personal malice."

Jefferson himself, involving an action taken when President in seizing the Batture at New Orleans, in which suit he felt confident that Marshall would decide against him.[1] "Were this case before an impartial Court, it would never give me a moment's concern," he wrote to William B. Giles, "but Livingston would never have brought it in such a Court. The deep-seated enmity of one Judge and utter nullity of the other, with the precedents of Burr's case, lessen the confidence which the justice of my cause would otherwise give me. Should the Federalists, from Livingston's example, undertake to harass and run me down with prosecutions before Federal Judges, I see neither rest nor safety before me." To Attorney-General Rodney he wrote that "the feelings of the Judge are too deeply engraven to let this distinction stand in the way of getting at his victim"; and to Secretary of the Treasury Gallatin, he wrote: "The Judge's inveteracy is profound, and his mind of that gloomy malignity which will never let him forego the opportunity of satiating it on a victim," so that an appeal to the Supreme Court would be imperative. Taking this highly unjustifiable view of Marshall's character and believing, as he said, that "it will be difficult to find a character of firmness enough to preserve his independence on the same Bench with Marshall", Jefferson was exceedingly anxious that no man should be appointed whose sturdy republicanism was open to any question.[2] His first choice for the position was

[1] Jefferson's suspicions of Marshall's fairness were unjustified; he won the case on a point of jurisdiction. For articles on this celebrated Batture controversy, see *Hall's American Law Review* (1808), II (1816), V; *Life of Thomas Jefferson* (1858), by Henry S. Randall, III; *Letters and Times of the Tylers* (1884), by Lyon G. Tyler.

[2] *Jefferson Papers MSS*, letters to William B. Giles and John W. Eppes, Nov. 12, 1810; *Jefferson*, XI, letters to Rodney, Sept. 25, 1810, and to Gallatin, Sept. 27: "What the issue of the case ought to be, no unbiased man can doubt. What it will be, no one can tell. . . . His decision, his instructions to a jury, his allowances and disallowances and garblings of evidence must all be the subjects of appeal.

Levi Lincoln, whose "pure integrity, unimpeachable conduct, talents and republican principles leave him now, I think, without a rival." To Gallatin he wrote:

I observe old Cushing is dead. At length, then, we have a chance of getting a Republican majority in the Supreme Judiciary. For ten years that Branch has braved the spirit and will of the Nation after the Nation has manifested its will by a complete reform in every branch depending on them. The event is a fortunate one, and so timed as to be a Godsend to me. I am sure its importance to the Nation will be felt, and the occasion employed to complete the great operation they have so long been executing, by the appointment of a decided republican, with nothing equivocal about it. But who will it be? . . . Can any other bring equal qualifications to those of (Levi) Lincoln? I know he was not deemed a profound common lawyer, but was there ever a profound common lawyer known in one of the Eastern States? There never was, nor never can be, one from these States. The basis of their law is neither common nor civil; it is an original, if any compound can be so called. Its foundation seems to have been laid in the spirit and principles of Jewish law, incorporated with some words and phrases of common law, and an abundance of notions of their own. This makes an amalgam *sui generis;* and it is well known that a man first and thoroughly initiated into the principles of one system of law can never become pure and sound in any other. Lord Mansfield was a splendid proof of this. Therefore, I say there never was, nor never can be a profound common lawyer from those States. . . . Mr. Lincoln is, I believe, considered as learned in their laws as any one they have. Federalists

I consider that as my only chance of saving my fortune from entire wreck. And to whom is my appeal? From the Judge in Burr's case to himself and his associate Judges in the case of *Marbury* v. *Madison*. Not exactly however, I observe old Cushing is dead."

Other Republicans also took a prejudiced view of Marshall in this case, and Robert Smith (Secretary of State) wrote to Jefferson, Oct. 1, 1810, suggesting his impeachment: "Should it happen that the plea to the jurisdiction be overruled and the Judge should declare himself competent to examine the opinion of the Chief Magistrate of the Nation and to adjudge him responsible in his property for an opinion, most assuredly such Judge will be held answerable to the Grand Inquest of the Nation." *Jefferson Papers MSS.*

say that Parsons is better; but the criticalness of the present nomination puts him out of the question.

To President Madison, Jefferson wrote a long letter in which he said that "another circumstance of congratulation is the death of Cushing"; that the Judiciary had long bid defiance to the people's will, "erecting themselves into a political body to correct what they deem the errors of the Nation. The death of Cushing gives an opportunity of closing the reformation, by a successor of unquestionable republican principles"; and that the appointment of Lincoln, because of his "firm republicanism and known integrity, will give compleat confidence to the public in the long desired reformation of their Judiciary."[1] Attorney-General Rodney also wrote to Madison supporting Lincoln.[2] If any other man were to be selected, Jefferson considered Gideon Granger the best man for the place. "His abilities are great; I have entire confidence in his integrity." Granger, though residing in Connecticut and out of the Circuit, was a very active candidate for the position, and was supported by the

[1] *Jefferson*, XI, letters to Rodney, Sept. 25, 1810, to Gallatin, Sept. 27, to Madison, Oct. 15. To Gideon Granger, the Postmaster General, he wrote, Oct. 22, that he considered "the substituting in the place of Cushing, a firm unequivocating republican, whose principles are born with him, and not an occasional ingraftment, as necessary to compleat that great reformation in our government to which the Nation gave its fiat ten years ago."

[2] *Madison Papers MSS*, letter of Rodney, Sept. 27, 1810: "The late Gov. Sullivan would have been a suitable person to have succeeded Judge Cushing. So is the late Gov. Lincoln, if his health will admit of it, tho I have understood he is likely to lose his eyesight. He is a sound lawyer, and what is more, an upright honest man. I fear Bidwell has injured himself too much to be thought of." See also *Jefferson Papers MSS*, letter of Rodney, Oct. 6, 1810: "Before I received your favor of Sept. 25, I had written to the President decidedly in favor of Mr. Lincoln. Mr. Gallatin unites with me in opinion it would be a great blessing to this country to have a majority of Republicans on the bench of the Supreme Court."

Barnabas Bidwell, above referred to, as to whom Jefferson had written to Gallatin that "the misfortune of Bidwell removes an able man from the competition", had been Attorney-General of Massachusetts, and becoming financially embarrassed, had been indicted, had fled the country and had had his name removed from the Bar roll. See *William Plumer Papers MSS*, letter to J. Q. Adams, Feb. 7, 1811.

Vice-President (George Clinton), by Lincoln himself, by William Plumer of New Hampshire, and by many lawyers in the Circuit. He was a skillful and energetic politician and a shrewd lawyer, but his associations with the Yazoo land claimants (as their agent before Congress) were likely to render him unacceptable to the Southern and Western Senators. This objection, however, he answered in a letter to Jefferson, saying: "Are the principal citizens of four States to be put under the ban of the Republic for a legal display and vindication of what they conceive their rights? Where shall a Judge be found? There is not a lawyer, whose residence is East of Delaware and whose talents and learning were valued, who has not given an opinion"; and he pointed out that the four other candidates from Massachusetts were all also connected with the Yazoo claims—Morton, Blake, Adams and Story; neither Vermont, New Hampshire nor Rhode Island, he asserted, could present any adequate or acceptable candidate.[1]

Of Massachusetts candidates other than Lincoln, George Blake, the United States Attorney for the past ten years, was the favorite candidate of the Bar. He was warmly supported by Gov. Elbridge Gerry, who wrote of his "professional character paramount to that of any person in the State who can be a candidate", of the "strenuous and successful support which he has officially and uniformly given to the Federal laws

[1] William Plumer wrote to Madison that: "I do not know any man in the First Circuit . . . that would give so much satisfaction as Mr. Granger. I have consulted a considerable number of the most reputable and influential Republicans in this Circuit and I am happy to add that their opinions fully coincide with my own." See *Jefferson Papers MSS*, letter of Granger Sept. 27, 1810; *Granger Papers MSS*, letters of Granger to Plumer, Oct. 21, 1810, Plumer to Granger, Oct. 30, Plumer to Madison, Oct. 30, Cutts to Plumer, Dec. 19. Jefferson wrote to Granger, Jan. 26, 1810 (see *ibid.*), expressing his "sense of the important aid I received from you in the able and faithful direction of the office committed to your charge. . . . It is a relief to my mind to discharge the duty of bearing this testimony to your valuable services."

and Administration, and his firmness and decision on all great Republican points and measures", and of his statesmanlike qualities, "bold, firm and decisive on the one hand and on the other candid, just and liberal."[1] Jefferson, however, was inexorably opposed to Blake, writing to Madison that Blake was a Republican only in name, "never was one at heart", and that "his treachery to us under the Embargo should put him by forever." Perez Morton, as Granger wrote, was "an accomplished and amiable gentleman of good information", but he had been twenty years away from the Bar, until recently made State Attorney-General; and Jefferson considered that he was too closely connected with Yazooism to be available, and that he was "inferior to both the others in every point of view." Story and Bacon were highly obnoxious to Jefferson because of their advocacy of the repeal of his pet Embargo Act in 1809; they "are exactly the men who deserted us in that measure and carried off the majority — the former unquestionably a tory, and both are too young."[2]

[1] *Madison Papers MSS*, letter of Sept. 23, 1810; see also letter of May 17, 1811. Gerry added: "Mr. Blake having lately married a very fine woman is become a remarkable domestic character well suited to the attentions and studies of a Judge." It is amusing to note that on this point, Granger had written to Jefferson as to Blake: "He is a man of fortune and lately married to the rich and gay youthful beauty of Vermont, Miss M —. I should think that he would not wish the sober, steady, prudent life which a Judge must lead, to have any influence in New England."

[2] To Henry Dearborn, Jefferson had already written, July 16, 1810, attacking Joseph Story of Massachusetts: "The Federalists, during their short ascendency have, nevertheless, by forcing us from the embargo, inflicted a wound on our interest which can never be cured, and on our affections which will require time to cicatrize. I ascribe all this to one pseudo-republican, Story. He came on (in place of Crowninshield, I believe) and staid only a few days, long enough however to get complete hold of Bacon, who, giving in to his representations, became panic-struck and communicated his panic to his colleagues, and they to a majority of the sound members of Congress. They believed in the alternative of repeal or civil war, and produced the fatal measure of repeal."

It is uncertain whether Story knew, before the publication of Jefferson's letter twenty years later, of this epithet applied to him by Jefferson. He appears then to have deeply resented it, and he wrote in his autobiographical sketch in 1831: "I was persuaded (in 1809) that if the Embargo was kept on during the year, there would be an open disregard and resistance of the laws. Mr. Jefferson has stig-

In Rhode Island, the Republican party was split into two factions, that headed by Governor Fenner and United States Attorney David Howell, favoring the United States District Judge, David L. Barnes; and the other section, with whom many Federalists were acting, supporting Asher Robbins.[1]

To Jefferson's early letters Madison replied promptly, October 19, 1810, saying that the vacancy was "not without a puzzle in supplying it. Lincoln obviously is the first presented to our choice, but I believe he will be inflexible in declining it. Granger is working hard for it. His talents are, as you state, a strong recommendation; but it is unfortunate that the only legal evidence of them known to the public, displays his Yazooism; and on this, as well as some other accounts, the more particularly offensive to the Southern half of the Nation. His bodily infirmity, with its effect on his mental stability, is an unfavorable circumstance also. On the other hand, it may be difficult to find a successor free from objections of equal force. Neither Morton, nor Bacon, nor Story have yet been brought forward. And I believe Blake will not be a candidate."[2] On the day after this letter, Madison wrote to Levi Lincoln, asking him to accept the position:

I feel all the importance of filling the vacancy with a character particularly acceptable to the Northern portion

matized me on this account with the epithet of 'pseudo-republican.' 'Pseudo-Republican', of course, I must be, as everyone was, in Mr. Jefferson's opinion, who dared to venture upon a doubt of his infallibility. . . . It is not a little remarkable that many years afterwards, Mr. Jefferson took great credit to himself for yielding up, *sua sponte* this favorite measure, to preserve, as he intimates, New England from open rebellion. What in me was almost a crime, became, it seems, in him an extraordinary virtue." *Story*, I, 184.

[1] *Madison Papers MSS*, letters of David Howell, Nov. 26, 1810, Seth Wheaton, Dec., 1810, Asher Robbins, June 3, 1811, John Pitman, Jr., Oct. 24, 1811. Asher Robbins became United States Attorney in 1812 and United States Senator from Rhode Island in 1825.

[2] *Madison*, VIII, letters to Jefferson, Oct. 19, Dec. 7, 1810, to Lincoln, Oct. 20, Dec. 10. *Madison Papers MSS*, letter of Lincoln, Nov. 27, 1810.

of our country, and as generally so as possible to the whole of it. With these views, I had turned my thoughts and hopes to the addition of your learning, principles and weight, to a Department which has so much influence on the course and success of our political system. I cannot allow myself to despond of this solid advantage to the public. I am not unaware of the infirmity which is said to afflict your eyes; but these are not the organs most employed in the functions of a Judge; and I would willingly trust that the malady, which did not unfit you for your late high and important station, may not be such as to induce a refusal of services which your patriotism will, I am sure, be disposed to yield. If your mind should have taken an adverse turn on this subject, I pray that you will give it a serious reconsideration; under an assurance that, besides the general sentiment which would be gratified by a favorable decision, there is nothing which many of your particular friends have more at heart, as important to the public welfare. As there are obvious reasons for postponing the appointment till the meeting of the Senate, you will have time to allow due weight to the considerations on which the appeal is founded; and it will afford me peculiar pleasure to learn that it has found you not inflexible to its object.

Several months elapsed while Lincoln was considering this offer, and meanwhile public rumor stated that Granger of Connecticut would be appointed.[1] Madison, however, evidently had no intention of making such a choice, for he wrote to Jefferson: "Granger has stirred up recommendations throughout the Eastern States. The means by which this has been done are easily conjectured, and outweigh the recommendations themselves. The soundest Republicans of New England are working hard against him as infected with Yazooism and intrigue. They wish for J. Q. Adams, as honest, able, independent and untainted with such objections. There are others, however, in the view of

[1] The *Hartford Courant*, Dec. 26, 1810, stated definitely that Granger was to be appointed.

the Southern Republicans; tho' perhaps less formidable to them than Yazooism on the Supreme Bench. If there be other candidates, they are disqualified, either politically, morally, or intellectually. Such is the prospect before me, which your experience absolutely understands." [1]

Finally, Lincoln decided that, owing to his advanced age and defective eyesight, he must decline the President's offer, and he wrote, November 27, expressing his appreciation of the honor but stating his inability to accept, and adding that: "The friends to the Union, as well in Rhode Island and New Hampshire as here, feel a great solicitude on the present occasion. Would to Heaven there was some character, whose pre-eminent talents, virtues and tried services, excluding all competition, left to you only the formal but pleasing duty of a nomination — some character with the requisite intelligence, but both blind and deaf — blind to the approaches of cabals, factions and party — deaf, deaf as an adder, to the suggestions of friends, ambition or prejudice, and to every other voice, however attuned, except to the voice of reason, patriotism, law, truth and justice." Disregarding this declination, Madison persisted in sending in Lincoln's name to the Senate on January 2, 1811, and he was confirmed the next day. But though strongly urged to accept by Attorney-General Rodney, who wrote that "in these times an honest and enlightened man, an able and upright lawyer, will be a great acquisition; the law, like the providence of God, should watch with an equal and impartial eye over all; this I am sure would be the

[1] Writing to Jefferson, Jan. 25, 1811, William Duane, speaking of Madison's failure to appoint Granger to the Bench, said: "That man Granger, disappointed of being nominated as a Judge — and he is better adapted for the ulterior office of Executive Justice — menaces to blow up the administration of Mr. Madison and he has some of his schemes now in motion for that effect." *Mass. Hist. Soc. Proc. 2d Series*, XV.

rule of your conduct," Lincoln felt obliged to reiterate his decision to decline the appointment.[1] Had he accepted, the future history of the Court and of American law would have been radically changed; for though an exceedingly able lawyer, he was a strong partisan Republican, the subject of constant Federalist attack, and "he would have been a thorn in the flesh of Marshall." [2]

On receiving Lincoln's declination, President Madison amazed the country by nominating to the position, on February 4, 1811, Alexander Wolcott, a prominent Republican political leader of Connecticut, a man of somewhat mediocre legal ability, who had served for many years as collector of customs.[3] "The Supreme Court which ought to be in Term here cannot proceed," wrote a Washington correspondent. "The law requires four Judges to constitute a Court, and only Judge Marshall, Washington and Livingston are present. Had it not been for the foolish attempt to compliment Mr. Lincoln with an appointment, it had previously been ascertained he could not and would not accept, a Judge might long since have been appointed and a quorum formed. But folly and inconsistency appear entailed on the administration of our country. At the instigation of Joel Barlow, the President has been induced to nominate to the Senate, one Alexander Wolcott, commonly called the

[1] *Madison Papers MSS*, letters of Lincoln, Nov. 27, 1810, Jan. 20, 1811; *Mass. Hist. Soc. Proc. 2d Series*, XV. Rodney's letter began: "I received a letter from that truly great and good man, Mr. Jefferson, strongly recommending you for the vacant seat on the Bench; and soliciting my interference on the subject. My reply was that I had anticipated his wishes. I trust you will not decline the situation, but promptly accept of it." Lincoln's commission was made out and actually sent to him. *Ibid.*, letter of R. Smith, Secretary of State to Lincoln, Jan. 20, 1801.

[2] *Mass. Hist. Soc. Proc. 2d Series*, XV, 230–238, remarks of George F. Hoar.

[3] Timothy Pitkin wrote to Simeon Baldwin, Feb. 25, 1806, that Pierpont Edwards of Connecticut expected to succeed Judge Cushing. *Life and Letters of Simeon Baldwin* (1919), by Simeon E. Baldwin.

State Manager of Connecticut. Even those most acquainted with modern degeneracy were astounded at this abominable nomination. The Senate were appalled." [1] "It has excited the astonishment of even Democrats with us, and will tend, even among them, to bring into contempt the President of the United States," wrote James Hillhouse to Pickering.[2] "We hope that even in the ranks of democracy, a man might have been found, whose appointment would have been less disgusting to the moral sense of the community, and whose private virtues or legal knowledge might have afforded some security from his political depravity," said a violent Federalist paper.[3] Another said: "We cannot conceive from what influence such a nomination could arise; that a man, barely qualified to discharge the duties of a justice of the peace in a country town, should be appointed to decide in the first instance upon commercial and legal questions of the greatest extent and consequence, and in a part of the United States where they so often arise and where so great law talents are essentially necessary, is a matter of wonder and astonishment to all parties, Republicans as well as Federalists." Another Washington correspondent wrote: "The doors of the Senate were closed sometime this day on the nomination of Alec Wolcott, I suppose. They say poor Alec goes hard, and it is not yet ascertained whether he can be crowded through or not. The Democrats of Massachusetts stick up their noses at the appointment. The Speaker of the House, Mr. Bacon, and others are displeased with the appointment. The

[1] *Columbian Centinel*, Feb. 16, 20, 23, 1811.

[2] *Pickering Papers MSS*, XXIX, letter of Feb. 17, 1811.

[3] *Connecticut Courant*, Feb. 20, 1811; for several years, the columns of this paper had teemed with abuse of Wolcott. See especially *ibid.*, Sept. 28, 1808; *New England Palladium*, Feb. 15, 19, 22, 1811; *New York Evening Post*, Feb. 8, 11, 20, 1811.

Federalists appear to care but very little about it. They stand by to see fair play." Other newspapers commented virulently on Wolcott's alleged personal habits and morals. All this flood of objurgation, however, was in fact due to Wolcott's vigorous enforcement of the Embargo and Non-intercourse laws, and any active supporter of those measures would have met with similar denunciation from the Federalist opposition, who did not hesitate to resort to personal scurrility in their political attacks.[1] On the other hand, even the Republican friends of the President found it difficult to make any enthusiastic defense of the nomination. Levi Lincoln wrote to Madison, expressing his indignation at the "obloquy heaped upon the candidate and the advocates of his appointment", and his assurance that he had for years been acquainted with Wolcott and had met few men "of larger mind, of greater perception and discriminating powers, of more steadfast and uniform adherence to the principles of the Union and arrangement of the General Government, . . . literary acquisitions." Yet when he approached the question of his merits and standing as a lawyer, Lincoln found himself hard pressed. "Whatever, therefore, may be his present attainments and legal habits, an industrious application to professional studies and official duties will

[1] The *Connecticut Courant*, Feb. 13, 1811, wrote: "For about ten years past, this man has been fattening upon an office, the emoluments of which were derived solely from commerce. Yet such is his hostility to the merchants, or such his devotion to the Continental system of Napoleon that in a public place in this City, a short time since, he remarked 'that the merchants of this country had governed it long enough, that they must be put down, that every man who owned part of a sloop or a hogshead of molasses undertook to dictate measures of government, but if Congress were of his opinion, the merchants might all go to hell in their own way, and that the non-intercourse law would be vigorously enforced (if the British Orders in Council were not revoked) let the consequences to the merchants be what they might.' Whether these sentiments or his lamblike temper, his winning manners, his moral character and his legal science were his principal recommendation for the high office to which he is nominated, we shall not attempt to decide."

soon place him *on a level at least* — with his Associates," was all he could say. "His independence, firmness and patriotism in being thus a valuable acquisition to the Bench, will, I conceive, be peculiarly useful and satisfactory to the friends of the National Administration in this section of the Union." [1] Such negative testimony was not enough to satisfy the Senate that Wolcott was fitted for the highest Court and it rejected the nomination by a vote of nine to twenty-four — "to their immortal honor as men and statesmen," said a Federalist paper. And as was said later by a Rhode Island Congressman, "Mr. Madison was thus enabled to make good retreat and a more judicious selection." [2] "The President is said to have felt great mortification at this result," wrote John Randolph. "The truth seems to be that he is President *de jure* only. Who exercises the office *de facto* I know not, but it seems agreed on all hands that 'there is something behind the throne greater than the throne itself.' . . . The Cabinet presents a novel spectacle in the political world, divided against itself, and the most deadly animosity raging between its principal members. What can come of it but confusion, mischief and ruin?" [3] In view of the fact, however, that Wolcott later gave public adherence to the doctrine that any Judge deciding a law unconstitutional should be expelled, as exercising usurped power, it was fortunate for the course of American legal history, that he did not secure this position on the Supreme Bench.[4] After the failure of this second attempt to fill the vacancy, the President was strongly urged to appoint

[1] *Madison Papers MSS*, letter of Lincoln, Feb. 15, 1811.

[2] *11th Cong., 2d Sess.*, 622. The *Aurora*, Feb. 21, 1811, charged that Wolcott's defeat was due to the activites of the friend of Aaron Burr.

[3] *Joseph H. Nicholson Papers, MSS*, letter of Randolph to Nicholson, Feb. 14, 1811; *John Randolph* (1882), by Henry Adams.

[4] See *Connecticut in Transition* (1918), by Richard J. Purcell, 397.

Jeremiah Smith, the distinguished Chief Justice of New Hampshire, and one of the ablest lawyers in New England, who, though a strong Federalist, was not a bitter partisan. "In questions merely political, parties will prefer those of their own sect — but *all* are equally concerned in the able and upright administration of justice," wrote Timothy Pickering in recommending Smith. "If the want of suitable qualifications cause erroneous judgments, it will be no consolation to a man that he suffers by the hand of a political brother. In one word, the dignity of the Supreme Court of the United States (hitherto maintained in the appointment of Judge Johnson and Judge Livingston), the confidence of the citizens in the wisdom and rectitude of its decision — and the welfare of the Union — require such an appointment; and allow me to add that it is not a matter of indifference to your own reputation." [1]

Madison, however, was resolved to appoint a Republican; and, as his third choice, he nominated John Quincy Adams (then Minister to Russia) on February 22, 1811; and the Senate at once confirmed Adams by a unanimous vote.[2] The appointment was highly

[1] *Pickering Papers MSS*, XIV, 326, letter to Madison, Feb. 6, 1811.

[2] Mrs. Abigail Adams (his mother) had written to Adams, Jan. 20, of Lincoln's appointment, and that "the newspapers say he accepted only to keep the place warm for J. Q. Adams whenever he returns." To Mrs. Cushing (widow of the Judge), Mrs. Adams wrote, March 8, 1811: "You will see by the publick papers that the President has nominated and the Senate unanimously appointed my son, as successor to your late and ever dear Friend, in his office as Judge; altho I know by information received early in the session from Washington, that it was his wish to do so, I considered his absence as an insurmountable objection. I also knew what interest, what importunate interest, would be made for many candidates. The appointment was altogether unexpected both to the (Ex) President and to me; the unanimity with which it was assented to, and the general satisfaction which it appears to give to all parties, will, I hope and trust induce him to accept the appointment which so honorably calls him back to his native land and which I hope will shield him from that spirit of animosity which has so unjustly assailed him. It will place him out of reach of competition for office, which occasions so much envy and jealousy amongst all parties. I had rather have him hold the office of Judge, than that of any foreign embassy or even Chief Magistrate of

acceptable to both political parties — the *Centinel* saying that it "gives much satisfaction in this quarter of the United States"; the *Independent Chronicle* becoming enthusiastic: "When the Bench of Justice shall be irradiated by worth and talents so unusually great as those of Mr. Adams; when virtue and patriotism so rare and so distinguished shall become the expounder and administrator of our laws, the Nation will indeed be blest, if his influence may have that weight which will be due to it in the Supreme Court of the country." Adams, however, declined the position, being, as he had written, "conscious of too little law" and also "too much of a political partisan." Madison, greatly disappointed at his refusal, now waited for six months before taking any further steps. Finally on November 15, 1811, he sent to the Senate the name of Joseph Story of Massachusetts, and three days later, November 18, the Senate confirmed the nomination. The facts surrounding this highly unexpected appointment remain a legal historical mystery. Story was only thirty-two years old, the youngest man then ever called to high judicial office; he had served but one term in Congress, and had been Speaker of the Massachusetts House of Representatives, but had held no judicial office. The motives which led Madison to choose this young lawyer are unknown. There is nothing in the published or available correspondence or in the newspapers of the day to show who either favored, indorsed or supported Story for the position, nor is there anything to show that Madison had any personal acquaintance with him, or what were the arguments which pre-

the United States. I think my dear friend, you will be gratified that the seat of your Friend so honorably held, and so faithfully discharged, will not be disgraced by his successor." *J. Q. Adams Writings*, IV, letter of April 10, 1811; *Mass. Hist. Soc. Proc.*, XLIV, 527.

vailed over Jefferson's repeated expressions of personal antipathy to Story. But as in so many other instances in the history of the United States when comparatively unknown men have been raised to positions of high authority, the Nation was singularly fortunate in the event. Story's own reasons for accepting the position were interesting.[1] "Notwithstanding the emoluments of my present business exceed the salary ($3500), I have determined to accept the office," he wrote. "The high honor attached to it, the permanence of tenure, the respectability, if I may so say, of the salary, and the opportunity it will allow me to pursue, what of all things I admire, juridical studies, have combined to urge me to this result. It is also no unpleasant thing to be able to look out upon the political world without being engaged in it, or, as Cowper says: 'tis pleasant from the loop-holes of retreat, to gaze upon the world!' The opportunity . . . of meeting with the great men of the nation, will be, I am persuaded, of great benefit to my social feelings, as well as intellectual improvement."

[1] *Story*, I, letter to Williams, Nov. 30, 1811: "The salaries of the Justices were fixed at $3500 in 1789. An unsuccessful attempt was made to raise them in 1816, and a memorandum was prepared by Judge Story in which it was urged that 'the necessaries and comforts of life, the manner of living and the habits of ordinary expense, in the same rank of society, have, between 1789 and 1815, increased in price from one hundred to two hundred per cent. The business of the Judges of the Supreme Court, both at the Law Term in February and on the Circuits, has during the same period increased in more than a quadruple ratio and is increasing annually. . . . By this increase of business the necessary expense of our Circuits is very much increased.'" Congress refused to act. In 1816, Judge Story was offered by Pinkney the opportunity to take over Pinkney's practice in Baltimore on resigning from the Bench. Pinkney's professional income was $21,000 per annum, and he stated that Story could safely calculate on $10,000. The offer was tempting, in view of the fact that a Judge's salary was only $3500. To the incalculable gain of the country, Story chose to resist the temptation. In 1819, Congress passed an act increasing the salaries to $5000. Prior to this increase, the *National Intelligencer*, Feb. 1, 1819, stated: "Judge Johnson, it is said, is about to resign his high office for one of less dignity, perhaps, but the emoluments of which are more adequate to the services rendered than those of a Judge of the Supreme Court"— the office thus referred to being that of collector of customs at Charleston.

The Democrats of Massachusetts were unenthusiastic over the appointment; and Jefferson, who regarded Story as a "pseudo-republican" because of his opposition to the Embargo Laws, was apprehensive, with considerable reason, as to his constitutional views. By the Massachusetts Federalists in general, the appointment of Story was received with ridicule and condemnation. "I remember my father's graphic account of the rage of the Federalists when 'Joe Story, that country pettifogger,' aged thirty-two, was made a Judge of our highest Court," wrote Josiah Quincy, Jr., and another Boston lawyer wrote later: "When we call to mind his youth, and remember how earnest and conspicuous he had been on the unpopular side in politics, it will not be a matter of surprise to learn that the news of his appointment fell with something like consternation upon the elder, the more apprehensive, and the more conservative portion of the people of New England. His merits as a lawyer could be scanned only by his professional brethren; his sweet and generous nature could be appreciated only by his friends. The public knew him as an enthusiastic partisan; and it is not too much to say that with many there was an apprehension that, in his hands, rights and property would hardly be safe." [1]

Some Federalists, however, realized the true independence of character of the man, his devotion to principle and his ardent belief in the National Union. One of their papers wrote, on his election to Congress in 1808, that: "Mr. Story is a gentleman who is well acquainted with the true interests of the country; he possesses a mind too independent to succumb to that pernicious foreign influence which has too long given

[1] *Figures of the Past* (1883), by Josiah Quincy, Jr.; *Memoirs of Joseph Story* (1868), by George S. Hillard.

a fatal complexion to our publick councils. Though he may sometimes advocate principles and measures which a genuine Federalist would feel it a duty to his country to oppose, *yet he will never submit to become a 'back-stairs' minion of Executive influence. . . .* We believe that Mr. Story has seen enough to convince him that a local, circumscribed system of politicks has obtained a dangerous ascendency in the country, and that he will use due exertion to restore . . . that happy equilibrium, . . . on the restoration of which the happiness and tranquillity of the Union essentially depend. We have seen Mr. Story, on occasions where our best institutions were in jeopardy, come forward with a praiseworthy independence, break the bonds of party connexion and display those abilities with which Providence has liberally endowed him for the public good." [1] This was a generous and accurate characterization to be made by a party opponent. Somewhat the same views were taken of Story by a few of the Federalist leaders; and so bitter a partisan as George Cabot had written to Timothy Pickering, in 1808: "Mr. Joseph Story of Salem goes to Washington as solicitor for the Georgia claimants. Though he is a man whom the Democrats support, I have seldom if ever met with one of sounder mind on the principal points of National policy. He is well worthy the civil attention of the most respectable Federalists; and I wish you to be so good as to say so to our friend Mr. Quincy, and such other gentlemen as you think will be likely to pay him some attention";

[1] *Boston Repertory*, May 31, 1808, quoted in *Charleston Courier*, June 17, 1808. That Story had a National reputation even at this early time is seen from the fact that his election as Congressman had received special notice in newspapers in different parts of the country. See *National Intelligencer*, June 1, 1808; *Charleston Courier;* and his position in favor of a navy was the subject of editorials. See *New York Evening Post*, Jan. 11, 1809.

while Harrison Gray Otis had written to Robert G. Harper at the same time: "I shall in a few days, give to a Mr. Story from this place a line of introduction to you, at his particular request, and will thank you to pay him such attentions as may be consistent with your convenience and leisure. He is a young man of talents, who commenced Democrat a few years since and was much fondled by his party. He discovered however too much sentiment and honour to go *all lengths* and acted on several occasions with a very salutary spirit of independence, and in fact did so much *good* that his party have denounced him, and a little attention from the right sort of people will be very useful to him and to us." [1]

While the appointment of this Judge, destined to such future eminence, was in general objectionable to both political parties, the Federalist fear of his alleged radicalism was wholly without foundation. But Jefferson's foreboding lest the new Judge should prove unsound on Republican political doctrines was justified; for within five years from the time of his appointment, Story had become an ardent supporter of the constitutional doctrines laid down by Chief Justice Marshall, and no Judge on the Court was more devoted to a liberal and Nationalistic interpretation of the Constitution and to the maintenance of National supremacy.[2]

[1] *Life and Times of George Cabot* (1877), by Henry Cabot Lodge, 376, letter of Jan. 28, 1808. *Harrison Gray Otis* (1913), by Samuel E. Morison, I, 283, letter of Otis to Harper, April 19, 1807.

[2] In a review of Story's *Commentaries on the Constitution*, in *North Amer. Rev.*, XXXVIII, in 1834, Edward Everett said: "Mr. Justice Story was of the Democratic party and shared the general views of that party on questions of constitutional policies; but with a mind of too legal a cast to run into wild revolutionary extremes. Coming upon the Bench with prepossessions of the character intimated, Mr. Justice Story rose immediately above the sphere of party; and, with the ermine of office, put on the sacred robe of the Constitution and the law. Henceforward, it became his duty, his desire, his effort, neither to strain the Constitu-

In Story's case, as in so many other instances in the history of the Court, there was shown the utter futility of the expectations, frequently entertained by politicians, that the judicial decisions of a Judge would accord with his politics at the time of appointment to the Supreme Bench. Time and time again it has been proved — and to the great honor of the profession — that no lawyer, whose character and legal ability would warrant his appointment to that lofty tribunal, would stoop to smirch his own record by submitting his judgment to the political touchstone; and no President has dared to appoint to that Court a lawyer whose character and ability could not meet the test. And so it has happened that when questions have arisen as to the effect to be given to the phraseology of the Constitution, Judges — Federalist and Anti-Federalist, Republican, Whig, Democratic and Republican — have united in so construing that instrument as to preserve the supremacy of the Nation.[1]

That the appointment of a strong Union man upon the Supreme Bench was of vital necessity in 1811, and that his party designation was of little consequence were well illustrated by the fact that it was in this year that the leading Federalist Congressman from Massachusetts voiced sentiments which were correctly termed "the first announcement on the floor of Congress of

tion, nor to travel around it, on the loose popular maxims which guide the partisans, but to interpret it with impartiality and administer it with firmness." As to the development of Story's Nationalistic views, see *Story*, I, letters of Feb. 22, Dec. 13, 1815. As early as 1818, he had reached the point of concurring with the Federalist party in its belief in the constitutionality of the Alien and Sedition Laws. See letter of Story, Dec. 27, 1818, quoted in Morison's *Harrison Gray Otis*, I, 122.

[1] Buchanan wrote July 18, 1857: "No Whig President has ever appointed a Democratic Judge of the Supreme Court, nor has a Democratic President appointed a Whig; and yet the remark has been general that the Democrats appointed to this Bench, from the very nature of the constitution of the Court, have always leaned to the side of power and to such a construction of the Constitution as would extend the powers of the Federal Government." *Works of James Buchanan* (1909), VIII.

the doctrine of secession." [1] Speaking on January 14, 1811, in opposition to the bill for the admission of Louisiana as a State, Josiah Quincy said: "I am compelled to declare it as my deliberate opinion that if this bill passes, the bonds of the Union are virtually dissolved; that the States which compose it are free from their moral obligations, and that, as it will be the right of all, so it will be the duty of some, to prepare definitely for a separation, amicably if they can, violently if they must." Such views, it is true, were not shared by all Federalists, and John Adams wrote to Quincy, with sanity and vision: "Prophecies of division have been familiar in my ears for six and thirty years; they have been incessant, but have had no other effect than to increase the attachment of the people to the Union. However highly we may think of the voice of the people sometimes, they not infrequently see further than you or I in many great fundamental questions." Nevertheless, it was of high importance to the survival of the American Union that its Judiciary at least should be so constituted as to prove a bulwark against the spread of such false constitutional doctrines. So evident had it become that it was the actions of the States, rather than of the Federal Government, which were then to be feared, that an ardent Democrat wrote about this time, deploring the fact that his party in the Federal Convention had "sowed the seeds of a premature dissolution of the Constitution and of the American Confederacy. . . . They directed all their efforts and all their views towards guarding against oppression from the Federal Government . . . which they labored to cripple and chain down to prevent its ravages.

[1] *History of the United States* (1855), by Richard Hildreth, III, 226; *Life of Josiah Quincy* (1867), by Edmund Quincy, 206 *et seq.*; *Works of John Adams*, IX, letter of Adams to Quincy, Feb. 9, 1811.

The State governments they regarded with the utmost complaisance, as the public protectors against this dreadful enemy of liberty. Alas! Little did they suppose that our greatest dangers would arise from the usurpation of the State governments, some of which are disposed to jeopardize the General Government." [1]

The long delay in the filling of the vacancy on the Court occasioned a singular episode in its history. On February 4, at the opening of the 1811 Term, only three of the seven Judges (Marshall, Livingston and Washington) were present.[2] By a provision of the Circuit Court Act of 1801 (retained in the Act of 1802) if four of the Judges should not attend within ten days after the date of the beginning of the session, the Court was to be continued over to the next stated session. An attempt was now made in Congress to obviate the necessity of such an adjournment, by the introduction of a bill allowing Court to be held by three Judges, but without power to hear or determine cases from the District of Columbia or any other cases except by consent of parties or counsel. The bill passed the Senate, but was opposed and lost in the House largely owing to the efforts of Troup of Georgia, who said that five of the members of the Court had, as far as they could, given away eight millions of the public property (in the *Yazoo Case*) and he would not confide such power to a smaller number of Judges.[3] Accordingly, the fourth Judge not having appeared in Washington on February 14, 1811, the Court was forced to adjourn without doing any business. Before the opening of the 1812 Term, another vacancy was

[1] *The Olive Branch* (Feb., 1815), by Mathew Carey, 23.

[2] *National Intelligencer*, Feb. 7, 14, 1811; Judge Cushing had died; Chase had been ill throughout the 1810 Term; Judges Todd and Johnson were unable to attend. See letters of C. A. Rodney to Nicholson, Feb. 9, 1811, Philip B. Key to Nicholson, Feb. 11, 1811. *Joseph H. Nicholson Papers MSS.*

[3] *11th Cong., 3d Sess.*, Feb. 11, 12, 1811.

caused by the death of Judge Chase, on June 17, 1811, at the age of seventy and after sixteen years' service. From the possible candidates to fill his place, Caesar A. Rodney of Delaware and John Thompson Mason, Robert Smith (Madison's Secretary of State)[1] and Gabriel Duval, all of Maryland, President Madison finally chose the latter, Duval, who had been Comptroller of the Treasury since 1802, and was then a man of fifty-one years of age. The Senate confirmed this appointment, as well as that of Joseph Story, on November 15, 1811; and the two new Judges took their seats at the 1812 Term.[2]

Of his initiation into his judicial duties, Story wrote: "I find myself considerably more at ease than I expected. My brethren are very interesting men, with whom I live in the most frank and unaffected intimacy. Indeed we are all united as one, with a mutual esteem which makes even the labors of jurisprudence light. The mode of arguing causes in the Supreme Court is excessively prolix and tedious; but generally the subject

[1] Smith had been an aspirant for the place before Chase's death; but President Madison had observed to Smith that "it might be most proper to seek a successor (to Chase) elsewhere, intimating also that he (Smith) had been so long out of the practice and study of the law, and that the Senate would be hard to please in such a case. He (Smith) made light of that consideration, with an expression of confidence in his standing there, which led me to remark that he was not aware how much room there was for a different estimate." *Madison*, III, memorandum of April 11, 1811. See also *Hartford Courant*, Oct. 24, 1810.

[2] The 1812 Term opened on Feb. 3, with Judges Washington, Livingston and Todd and the two new Judges, Duval and Story, present. Chief Justice Marshall was delayed by a fractured collar-bone, caused by the overturning of the stage coach on the way from Richmond, and did not appear until Feb. 14; Judge Johnson was also ten days late in reaching Washington. Accidents in coach travel were frequent in those days. The *Washington Federalist*, Feb. 9, 1809, describing the opening of the Term said: "Judge Paterson is not yet sufficiently recovered, from the great injury he sustained from being upset on his way home from Albany last fall, to be able to travel." At another Term, Judge Livingston was detained from the same cause. In the debates on the removal of the seat of Government from Washington to some other city, in 1808, one of the arguments advanced was "the wretched state of the roads over which you must pass to the Seat of Government from any quarter." *10th Cong., 1st Sess.*, 159, Feb. 8, 1808. See also *Diary and Letters of Gouverneur Morris* (1888), II, 393.

is exhausted, and it is not very difficult to perceive at the close of the cause, in many cases, where the press of the argument and of the law lies. We moot every question as we proceed, and my familiar conferences at our lodgings often come to a very quick, and I trust, a very accurate opinion, in a few hours. On the whole, therefore, I begin to feel the weight of depression with which I came here insensibly wearing away, and a calm but ambitious self-possession gradually succeeding in its place. . . . Many of our causes are of extreme intricacy. Long chancery bills, with overloaded documents, and long common law records, with a score of bills of exceptions attached to them, crowd our docket. One great cause of the Holland Land Company, of which I had a printed brief of two hundred and thirty pages, lasted five days in argument, and has now been happily decided. It was my first cause, and though excessively complex, I had the pleasure to find that my own views were those which ultimately obtained the sanction of the whole Court." [1]

The chief case of importance decided at this 1812 Term was *The Schooner Exchange* v. *McFaddon*, 7 Cranch, 116, involving a libel against an American ship captured by the French and converted into a public ship of France, the exemption of which from suit in our Courts was asserted by the Emperor Napoleon. "At the instance of the executive departments of the United States", Alexander J. Dallas, the United States Attorney for Pennsylvania, appeared in support of the sovereign rights so claimed. On March 3, 1812, only seven days after the argument, the Chief

[1] *Fitzimmons* v. *Ogden*, 7 Cranch, 2, involving the bankrupt affairs of Robert Morris, the financier of the Revolution, who had overspeculated in lands, and the actions of Gouverneur Morris, relative to great tracts of land in Western New York purchased by Robert Morris. *Story*, I, 215, letter of Feb. 24, 1812.

Justice delivered the opinion of the Court, sustaining the exemption of all public ships of friendly nations from the jurisdiction of our Courts, an opinion which has ever since constituted one of the great fundamental decisions in international law. To the argument of Robert G. Harper, the Federalist counsel for the defendants, who had urged that the Court consider the Emperor's infractions of our neutral rights, Marshall replied that wrongs arising from such conditions were "rather questions of policy than law" and "are for diplomatic rather than legal discussion." That the decision, thus upholding the action of the Madison Administration and favoring the French cause, was an unpopular one with the Chief Justice's party may be seen from an editorial headed "Our Degraded Country", in a violent Federalist paper of the day and referring to another case where similar action had been taken: "What is the melancholy fact — as if thankful under all our sufferings inflicted by France, we are heaping favours upon them in proportion to the wrongs we suffer. Look at the following fact; a French vessel, *La Franchise*, was seized by an officer of our Government for violating our laws at New Orleans. The action which was brought for condemnation, and a judgment upon which would certainly have condemned her, was dismissed by direction of the President and the vessel ordered to be restored. And why? She was a national vessel under the command of Capt. de Vaisseau. They take our national vessel in Holland and condemn her without violating any law; we take their national ship which by express law was liable to confiscation and then restore her. . . . If the vengeance of this people is not raised against such a nation as France, and such rulers as our own, then we are fit only to live and die

slaves." [1] In another case, *Williams* v. *Armroyd*, 7 Cranch, 423, in which an American ship had been seized by the French under Napoleon's Milan Decree, Marshall, while stating that "the edict under which this sentence was pronounced is a direct and flagrant violation of (international) law", decided, nevertheless, that the seizure must be upheld, as title had been adjudicated in the French Prize Court. And since Congress had not chosen to declare the sentences of condemnation pronounced under this unjustifiable decree to be absolutely void, he stated that "they retain, therefore, the obligation common to all sentences whether erroneous or otherwise, and bind the property which is their object; whatever opinion other co-ordinate tribunals may entertain of their own propriety, or of the laws under which they were rendered." With like impartiality in enforcing international law, even against American interests, the Court held American traders to the strictest performance of their duties as neutrals, in a long series of cases, chiefly involving marine insurance companies.[2]

While the 1813 Term, held in the midst of the War of 1812, was not of particular significance, that of 1814 was full of interest. "Owing to the variety of questions arising out of the novelty of a state of war in our country, it has been the most important Term that has been held for many years," stated a contemporary newspaper, and Judge Story wrote: "We had a most laborious session. We were stuffed with all sorts of complicated questions, particularly of Prize Law, in respect to which I was obliged to take a decided

[1] *Connecticut Courant*, July 18, 1810; see opinion of Attorney-General Rodney, April 3, 1810, *26th Cong., 2d Sess.*, House Doc., 123, not published in the official *Ops. Attys.-Gen.*, I.

[2] For an interesting survey of the laws of war and prize at this time, see Charles J. Ingersoll's *Historic Sketch* (1852), I, ch. 2.

part. As usual, the old maxim was verified — *Juniores ad labores.* I worked very hard, and my brethren were so kind as to place confidence in my researches." [1] The first war case was decided on March 2, 1814, *Brown* v. *United States*, 8 Cranch, 110. It involved the right of the United States to confiscate enemy property within its borders; and Marshall laid down the broad doctrine that the power of the Government over enemy persons and property was plenary; but that, in view of the modern and Christian practices in time of war, and the duty of the United States "to receive the law of nations in its modern state of purity and refinement", the intention to exercise such an extreme power as that of confiscation must be evidenced by Congressional action, the President not having the power without sanction by Congress. It is interesting to note that the Attorney-General of the United States submitted the case without argument (relying on Judge Story's opinion in the Circuit Court) and lost the case.

A series of upwards of twenty cases, in which the Court rigidly enforced the non-intercourse statutes and established the rules of law governing the subject of trading with the enemy, revealed the extent to which American citizens in the Eastern States were out of sympathy with the War of 1812, and the multifold and variegated illegal devices by which they attempted to carry on commercial transactions with the enemy, and even for the enemy's direct benefit, "voyages loaded with infamy" as the Court remarked in one case.[2]

[1] *National Intelligencer*, March 19, 1814. *Story*, I, 261, letter of April 24, 1814.

[2] In *The Amiable Isabella*, 6 Wheat. 86, Judge Johnson referred to "the sad depravity of morals exhibited by witnesses in Prize Courts." For examples of fraudulent devices, see *The George*, *The Bothnea* and *The Jahnstoff*, 1 Wheat. 408, 2 Wheat. 169, 278. Very interesting letters from Harrison Gray Otis, a leading Federalist lawyer of Boston, to Robert G. Harper of Baltimore, Dec. 2, 1815, May 26, 1817, about these cases are to be found in the *Harper Papers MSS.* Otis was

In *The Rapid*, 8 Cranch, 155, the question arose whether bringing into this country goods purchased in England before the war and stored in Nova Scotia was illegal, as constituting trading with the enemy. It was claimed that this was not a "trading" within the meaning of the term; but the Court refused to confine the term to the narrow limits of mere negotiation or contract, and stated that "the object, policy and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent States." To the plea of hardship to American citizens, Judge Johnson replied: "It is the unenvied province of this Court to be directed by the head, and not the heart. In deciding upon principles that must define the rights and duties of the citizen and direct the future decisions of justice, no latitude is left for the exercise of feeling. . . . On the subject which particularly affects this case, there has been no general relaxation. The universal sense of nations has acknowledged the demoralizing effects that would result from the admission of individual intercourse. The whole nation are embarked in one common bottom and must be reconciled to submit to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy — because the enemy of his country." The case of *The Julia*, 8 Cranch, 181,[1] presented for decision the

counsel for the alleged fraudulent captors, and in his letters inveighed against Judge Story who decided against him in the lower Court. He wrote to Harper to engage him to argue the cases in the Supreme Court, and after stating that $100,000 was involved, said: "If you think fit to enlist Pinkney or any other person in whom you have more confidence and who will engage upon the understanding of being paid $1000 or even $1500, in the event of success only, you are at liberty to do it." Pinkney evidently did not accept this contingent fee, as he appeared in the cases on the opposite side with Samuel Dexter. Otis, after the cases were won, sent a fee of $3000 to Harper and $1500 to his associate, W. H. Winder. See also *The St. Nicholas*, 1 Wheat. 417; and as to non-intervention laws, see *United States* v. *1960 Bags of Coffee*, 8 Cranch, 398; *Brig Struggle*, 9 Cranch, 71.

[1] See also *The Venus*, 8 Cranch, 253.

legality of an extraordinary practice, indulged in by New England merchants, with whom the war was highly unpopular, of accepting British licenses protecting them under certain conditions from capture by British warships. In this case, the British Vice-admiral at Halifax had issued a license to an American vessel to carry provisions to Spain and Portugal for the use there of the allied armies, Spanish and British, such trade consequently affording direct aid by Americans to the army of an enemy. Judge Story, in giving the opinion of a majority of the Court holding it to be illegal, stated that he was not "insensible that it has entered somewhat into political discussions, and awakened the applause and zeal of some, and the denunciations of others"; but he said that a part of the people may not "claim to be at peace, while the residue are involved in the desolations of war"; and he caustically stated that the license presented facts "which it is no harshness to declare are not very honorable to the principles or the character of the parties. . . . The public dangers to which it must unavoidably lead, by fostering interests within the bosom of the country, against the measures of the government . . . can never be lost sight of in a tribunal of justice." [1] The decisions in these cases were favorably commented on by a leading newspaper of the day, as having "put the axe to the root of a very extensive fraudulent traffic with the enemy, and cannot fail to be acceptable as well to the fair and honest merchant as to all the friends of the war, throughout the United States"; and it

[1] Story wrote, Aug. 3, 1813, after his decision in this case in the Circuit Court; "I have understood that soon after the war Mr. Pinkney was inclined to the opinion that licenses were not illegal. . . . The cause has now gone to the Supreme Court, and he will of course be engaged in behalf of the captors. I expect a difference of opinion among the Court; the great questions of national law have not been familiarized among us." It is to be noted that at this time, the term "national law" was commonly used for "international law." *Story*, I, 246.

described the Court as "a branch of the Government which it is important to hold in due veneration, and whose decisions are entitled to the highest respect." The paper also rejoiced that "a greater interest than usual waits on its present session. So great is the attraction that, notwithstanding the importance and interest of the debates in the two Legislative bodies holding their sessions in the same pile of buildings, it is frequently difficult to keep a quorum in either House of Congress owing to the number of members who crowd to hear the pleadings in the Court. Yesterday, particularly, the Court was more crowded than we have ever seen it. The pleaders whom we heard were William Pinkney of Maryland, the late Attorney-General, and better known as a diplomatist whose preëminent talents are universally acknowledged, and Samuel Dexter, a great law-character and distinguished citizen of Massachusetts." [1] "The arguments of this Term have been conducted with unusual ability," wrote Judge Story. "Mr. Dexter and Mr. Pinkney have sometimes been opposed to each other, and in the conflicts have roused themselves to most strenuous exertions. Every time I hear the latter, he rises higher and higher in my estimation. His clear and forcible manner of putting his case before the Court, his powerful and commanding eloquence, occasionally illuminated with sparkling lights, but always logical and appropriate, and above all, his accurate and discriminating law knowledge . . . give him in my opinion a great superiority over every other man whom I have known." Of Dexter, Story wrote that "he and Mr. Pinkney have called crowded houses; all the belles of the city have attended and have been en-

[1] *National Intelligencer*, Feb. 24, 1814. The case referred to was *The Aurora*, 8 Cranch, 203, argued by Samuel Dexter of Massachusetts and David Hunter of Rhode Island against William Pinkney.

tranced for hours", and that Dexter's oratory was "calm, collected and forcible, appealing to the judgment. Mr. Pinkney is vehement, rapid, and alternately delights the fancy and seizes on the understanding. He can be as close in his logic as Mr. Dexter when he chooses, but he can also step aside at will from the path, and strew flowers of rhetoric around him." [1]

Owing to the burning of the Capitol by the British in August, 1814, the Court held its 1815 Term in temporary quarters.[2] Of this session, Judge Story wrote: "We are deeply engaged in business; very important cases have already been decided, and many are yet in advance. We have very able counsel: Messrs. Emmett, Hoffman and Ogden of New York, Dexter of Massachusetts, Stockton of New Jersey and Pinkney of Baltimore. Mr. Pinkney and Mr. Emmett have measured swords in a late cause. Mr. Emmett is the favorite counsellor of New York, but Pinkney's superiority was, to my mind, unquestionable. I was glad, however, to have his emulation excited by a new rival. It invigorated his exertions, and he poured upon us a torrent of splendid eloquence." [3] The reference by Story was to the famous case of *The Nereide*, 9 Cranch, 388, of which a New York newspaper remarked that: "Few cases have excited more interest . . . not only on account of the value of the property in controversy, but the important questions of national law which were involved in it. . . . It was argued with great ability on both sides. It was a contest indeed, in which political pride, independent of every other consideration, would naturally strive for victory; for Mr. (J. Ogden) Hoffman, Mr.

[1] *Story*, I, 251–253, letter of March 6, 10, 1814, regarding the argument of *The Aurora* and *The Frances*, 8 Cranch, 203, 335.

[2] *National Intelligencer*, Feb. 8, 18, March 14, 1815; see *infra*.

[3] *Story*, I, 253, letter of Feb. 22, 1815.

(Thomas Addis) Emmett and Mr. (John) Wells had given strong and decided opinions in favor of the claim; whilst Mr. (Alexander J.) Dallas, Mr. (William) Pinkney and Mr. (Robert G.) Harper had given equally strong and decided opinions in favor of the captors. Mr. Dallas who opened for the captors and Mr. Pinkney who followed him on the same side exhibited their whole strength; the latter gentleman in particular, distinguished as he always is, surpassed himself. Mr. Hoffman's opening argument and Mr. Emmett's concluding reply are spoken of as the most splendid specimens of forensic learning and eloquence." [1] The decision of Marshall in this case, holding illegal the seizure by an American privateer of a valuable cargo shipped by a Spanish neutral merchant in a British armed vessel, again showed the determination of the Court to uphold to the utmost the rights of neutrals. That a neutral had the right to ship his goods in an armed merchantman of one of the belligerents was held to be "a part of the original law of nations." To the argument that, since the neutral property in this case was Spanish and under Spanish law would be confiscated, an American Court ought in retaliation to apply the same rule, Marshall replied "that such matters were for consideration of the Government, not of the Court. . . . It is not for us to depart from the beaten track prescribed for us, and to tread the devious and intricate path of politics"; and Judge Johnson said: "To the Legislative power alone, it must belong to determine when the violence of other nations is to be met by violence; to the Judiciary, to administer law and justice as it is, not as it is made to be by the folly or caprice of other nations."

[1] *New York Evening Post*, March 15, 1815. For a long and picturesque account of the arguments and characteristics of William Pinkney and Thomas A. Emmet in *The Nereide* and in *The Frances*, 9 Cranch, 183, at this Term, see *Ticknor*, I, 38, 41.

Though the National Government emerged from the war technically victorious over an external enemy, it had for three years been considerably weakened by serious internal dissensions. Both the National Executive and the Government itself had been openly set at defiance by States in the North whose hostility had culminated in the Hartford Convention. Never in its history, therefore, had there been greater need of steadfast support of the National supremacy by the Judiciary. By a singular chance, the occasion was presented to the Court, at the first Term after the close of the war, to consider and determine the limits of the National authority, in two great cases decided in 1816, which, though unrelated as a matter of law, must historically be considered together. In the first of these, *United States* v. *Coolidge*, the Court found itself obliged to limit the power of the Courts of the United States; but in the second, *Martin* v. *Hunter's Lessee*, it upheld their power against a most dangerous attack, and rendered a decision which vitally affected the future history of the country and strengthened the bonds of the American Union.

In the *Coolidge Case*, there was finally set at rest a question which had long been the subject of heated differences of opinion, both at the Bar and in the political field — whether the United States Courts had jurisdiction to try persons indicted for offenses, criminal at common law but not made criminal by any specific Federal statute. In the early years of the Court, Chief Justices Jay and Ellsworth, and Judges Cushing, Iredell, Wilson, Paterson and Washington had each delivered opinions or charges in support of the existence of such jurisdiction. The first Judge to express a contrary view had been Judge Chase, who, in April, 1798, startled his colleague (District Judge

Peters) and the Bar by announcing, in *United States* v. *Worrall*, 2 Dallas, 384, that he would entertain no indictments at common law. While by statesmen much attention was paid to the decision, it was not followed by the other Judges, and it was regarded by the Federalists as embodying a disastrous doctrine.[1] "I considered Mr. Chase as one of the men whose life, conduct and opinion had been of the most extensive influence upon the Constitution of this country," wrote John Quincy Adams in his diary, several years later, "but he decided, as I think, directly in the face of an amendatory article of the Constitution of the United States (the Seventh) that the Union in its federative capacity has no common law — a decision which has crippled the powers, not only of the Judiciary, but of all the Departments of the National Government. The reasons upon which he rested that decision are not sound but . . . they flattered the popular prejudices." Though in 1804, Judge Johnson, a Republican, adopted Judge Chase's view and the tide of public opinion ran high against this exercise of com-

[1] Judge Story wrote in 1816: "Excepting Judge Chase, every Judge that ever sat on the Supreme Court bench from the adoption of the Constitution until 1804 (as I have been very authoritatively informed) held a like opinion." *Story*, I, 299. See also *Criminal Law*, by Francis Wharton, I, 168. Peter S. Duponceau wrote in 1824 that: "This decision of Judge Chase made a great noise at the time and left vague but strong impressions, the more so as he was known to be a man of deep learning and considerable strength of mind, and more disposed to extend than limit power." *Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States* (1824); see also *Review* of the same by Charles J. Davies, in *North Amer. Rev.* (1825), XXI, in which he said: "The opinion of Judge Chase seems to have been reverenced as a sort of perpetual edict" — a comment, clearly erroneous. District Judge Peters, who dissented from Judge Chase's view in the *Worrall Case*, continued to entertain jurisdiction of criminal indictments at common law in Pennsylvania; see full account of the arrest and binding over for trial in the Federal Circuit Court of B. F. Bache, editor of the *Aurora*, "on a charge of libelling the President in a manner tending to excite sedition and opposition to the law", contained in *Aurora*, June 27, 30, 1798, in which after reciting the argument of defendant's counsel, Alexander J. Dallas, it is said: "Judge Peters observed that it certainly would be superfluous to discuss the question of jurisdiction before him, as his mind was confirmed in the opinion which he delivered in the case of Worrall, by the maturest reflection."

mon law jurisdiction, nevertheless, other Judges of the Supreme Court, sitting in the Circuit Courts, held the crime of perjury indictable in such Courts under the common law;[1] and in 1807, criminal indictments under the common law were found in Federal Courts in Kentucky and in Connecticut. While the Kentucky case was dismissed,[2] the Connecticut case finally came before the Court for decision in 1812, under the following very peculiar circumstances. In 1807, a series of eleven indictments based on the common law had been found in the United States Circuit Court for the District of Connecticut, against various Federalist lawyers, preachers and editors for libelous attacks on President Jefferson.[3] That such indictments should

[1] District Judge Peters wrote: "The point of not resorting to common law or even British statutory interpretation, such as it was before our Revolution, was first furiously made (as well as I now recollect) by Judge Johnson in a most atrocious case of piracy and robbery, proved beyond a doubt in South Carolina. We had the same case involved here, in a case of the criminal's associates in the enormities. It was one of the most infamous I ever sat in." *Pickering Papers MSS*, XXIX, letters of March 24, April 14, 1816. See also J. Q. *Adams*, V, Dec. 18, 1820; argument of Alexander J. Dallas in *United States* v. *Passmore*, 4 Dallas, 372, April, 1803.

[2] This case has not been hitherto noted by legal historians. Joseph H. Daviess, United States Attorney for Kentucky, a Federalist, wrote in his *Sketch of the Political Profile of Three Presidents, Quarterly Pub. of the Hist. and Phil. Soc. of Ohio* (1917), XII, in 1807, referring to an atrocious murder of Indians by white men, that when a mob rescued one of the murderers "General Dearborn (Secretary of War) enclosed me Mr. Lincoln's (Attorney-General) opinion in writing, with orders to prosecute the leader of the riot *under the common law*. I wrote back to the Secretary, reminding him of the public heat his party had raised about the common law, and desiring to be instructed whether I should go on; and I indicted the man, but stated to the Court my own opinion of the want of jurisdiction. The Court dismissed it. Before the Court was over, the post brought Gen. Dearborn's letter forbidding me to proceed."

[3] See as to these cases, *New York Evening Post*, July 3, 1807; *Connecticut in Transition* (1918), by Richard J. Purcell, 277, giving accounts of the indictments for libelous attacks on President Jefferson, of Judge Tapping Reeve, Thaddeus Osgood, Thomas Collier (a Litchfield printer) in 1805, and Rev. Aseland Backus and of Hudson and Goodwin (editors of the *Connecticut Courant*) and others in 1807. See also "*A Letter to the President touching the Prosecutions under his Patronage* (1808), by Chatham." *The New England Patriot being a Candid Comparison of the Principles and Conduct of the Washington and Jefferson Administrations* (1810) 13, charged that the Democratic leaders, under advice of Attorney-General Lincoln, were determined to punish "Oppugnation" to the Government and instituted prosecutions at common law against newspapers "for daring to exhibit to the people the true state of the publick affairs."

have been instituted during the Administration of a statesman, whose hostility to the doctrine of common law Federal prosecutions had been bitter and long continued, was a singular anomaly in American legal history. None of the cases were tried; for Jefferson, who had not known of their existence, ordered their dismissal as soon as he learned of them; and all but one were nol-prossed in 1808 and 1809.[1] One case, however, survived and reached the Supreme Court, on certificate from the Judges of the Circuit Court who divided in opinion on the point of jurisdiction. Meanwhile, the institution of these common law prosecutions had been the subject of severe attack upon Jefferson on the floor of Congress. John Randolph said he learned "this awful truth" of their existence "with infinite surprise", and he was horror-stricken that they "appeared scarcely to excite a sensation either in this assembly or the public, in the men who were most clamorous against the Sedition Law. . . . Such is the difference between men in power and men out of power; such the difference between profession and practice." Edward St. L. Livermore, a Federal-

[1] *Jefferson*, X, XI, letters to Thomas Seymour, Feb. 11, 1807, to Wilson Cary Nicholas, June 13, 1809, in which Jefferson said that he understood that "these prosecutions had been invited, if not instituted, by Judge (Pierrepont) Edwards, and the marshall, being republican, had summoned a jury partly or wholly republican; but that Mr. Huntington (U. S. Attorney) declared from the beginning against the jurisdiction of the Court and had determined to enter nolle prosequi, before he received my direction." See also letter from Gideon Granger in *National Intelligencer*, July 21, 1808, giving the facts as to Jefferson's attitude. Jefferson writing to Granger, Jan. 26, 1810, said that the Connecticut prosecutions had been "false and maliciously" attributed to him (Jefferson) and he thanked Granger for his public explanation; in another letter to Granger, March 9, 1814, he explained the reasons for his order for the dismissal of the cases. *Gideon Granger Papers MSS.*

The *Connecticut Courant*, whose editors were indicted, was particularly virulent over these indictments, and sarcastic over their dismissal, Sept. 28, 1808; and on May 17, 1809, it said: "Melancholy Obituary, Died at New Haven during the session of the Circuit Court in April last Indictment No. 11. . . . This was the eleventh death in the same family in the short space of about three years, and all victims of one disease, the nolle prosequi or Quash Fever."

ist of New Hampshire, proposed the passage of a law to punish such egregious abuses of power. Ezekiel Bacon of Massachusetts, a Republican, agreed with Randolph. It was under such peculiar circumstances that the case involving the existence of the right to indict in the Federal Courts for common law crimes reached the Supreme Court for argument in 1812, *United States* v. *Hudson and Goodwin*, 7 Cranch, 32. Inasmuch as both political parties now opposed the doctrine, and as all the other Connecticut cases had been dismissed by Presidential order, both the Attorney-General, William Pinkney, and the counsel for the defendants, Samuel W. Dana, Congressman from Connecticut, declined to argue the case.[1] Consequently, this far-reaching question as to the jurisdiction of the Federal Judiciary was decided by the Court, in a summary manner without any assistance from the Bar; and Judge Johnson stated in a short and loosely reasoned opinion that the Court considered the question "as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted, and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition"; and he held that exercise of criminal jurisdiction in common law cases was not within the implied power of the Federal Courts. While the principle then established was undoubtedly sound and wise in thus limiting indefinite powers of Federal Courts, it left the United States Government in a singularly helpless condition;

[1] Samuel W. Dana first called the attention of Congress to these prosecutions Jan. 2, 1807, *9th Cong., 2d Sess.* On Feb. 2, 1809, he again adverted to them. *10th Cong., 2d Sess.* And on May 25, 1809, there was a general debate on the subject on Randolph's proposed resolution to inquire, "what prosecutions had been entertained by the Courts of the United States for libels at common law, and to report such provisions as in their opinion may be necessary for securing the freedom of speech and of the press." *11th Cong., 1st and 2d Sess.*

for Congress had enacted very few statutes specifically defining Federal crimes. And it was peculiarly disastrous that the decision should have been rendered at this particular period; for during the next four years, the excited and refractory citizens of the Northern States, in their violent opposition to the War of 1812, were not only resisting the enforcement of existing laws but also eager to take advantage of any gaps in the Federal criminal law. It was, therefore, plainly imperative that Congress should do something to counteract the effect of the *Hudson Case* decision. No one saw the need of legislation more clearly than Judge Story, who, instructed by his experience in the Circuit Court in Massachusetts, wrote: "The Courts are crippled; offenders, conspirators and traitors, are enabled to carry on their purposes almost without check. It is truly melancholy that Congress will exhaust themselves so much in mere political discussions, and remain so unjustifiably negligent of the great concerns of the public." [1] Again, he wrote: "Pray induce Congress to give the Judicial Courts of the United States power to punish all crimes and offences against the Government as at common law. Do not suffer conspiracies to destroy the Union to be formed in the bosom of the country, and yet no laws exist to punish them"; and again, in 1813: "A disgraceful affair has happened in Boston, of the rescue of a prize by the owners. I should not be at all surprised that the actors should escape without animadversion, owing to defects in our criminal laws. Nor shall I be astonished, that in all cases of American vessels seized, trading with the enemy, forcible rescues should be attempted hereafter, even against our

[1] *Story*, I, 243, 247, letters to N. Williams, Oct. 8, 1812, May 27, Aug. 3, 1813.

national ships. What Congress means by their gross and mischievous indifference to the state of the criminal code, I know not."

In 1814, when the crime of trading with the enemy had become extremely prevalent and there existed no adequate Federal statutes relating to this crime, it was felt in several localities that indictments ought to be sought at common law, in spite of the decision of the Court in the *Hudson Case*. Attorney-General Richard Rush, however, wrote to the United States Attorney in Massachusetts, discountenancing any such prosecutions and saying:[1]

> I must declare that I do not think the common law applicable in such a case to the Government of the United States. . . . I do not think that a Federal Republic like ours, resting upon, as its only pillars, the limited political concessions of distinct and independent sovereign States, drew to itself, by any just implication, at the moment of its circumscribed structure, the whole common law of England, with all or any portion of its dark catalogue of crimes and punishments; . . . a code which, among the vast variety of actions that, in a complicated community, human frailty may be betrayed into, denounces, upon scarcely less than two hundred, capital infliction, thereby, as the regular and melancholy fruits of such a system, and as authentic lights assure us, imprinting more of human blood upon the gibbet than is known to the same extent of population in any other portion of Europe. Against the incorporation of such a code, even with the limitations that might be implied, upon the jurisprudence of the Union, I perceive serious and insurmountable objections. I believe, also, that this opinion has been adopted, partially at least, by the highest judicial tribunal known to the Constitution, although I observe that you speak doubtfully upon this point, considering it not yet ultimately at rest.

In view of the existing war conditions, it was natural that the case which finally settled the question

[1] *13th Cong., 3d Sess.*, 1821 *et seq.*, letter of July 28, 1814.

of the common law jurisdiction of the Federal Courts, should arise in connection with illegal trading with the British, and should come to the Supreme Court from the Circuit Court in Massachusetts. In *United States* v. *Coolidge*, 1 Wheat. 415, an indictment had been found against the defendants for forcibly rescuing a prize captured by an American privateer. Though no Federal statute made such an act criminal, Judge Story, sitting in the Circuit Court, held that as it was an offense under admiralty law, it was punishable by a Federal Court even without a statute. The Judges in the Circuit Court, however, dividing in opinion, the case was certified to the Supreme Court. When it came up for argument, now in 1816, Attorney-General Rush said that "he had given to this case an anxious attention", but believing that the *Hudson and Goodwin* decision was controlling, he declined to argue; and no counsel appeared for the defendants. In the absence of any argument, the Court, through Judge Johnson, said that: "A difference of opinion has existed, and still exists, among the members of the Court. We should, therefore, have been willing to have heard the question discussed upon solemn argument"; but in the absence of any argument, it held that it would not review the former decision. Hence, in this unsatisfactory manner and without any argument before the Court, this highly important and fundamental question in the history of American law was settled.[1]

The extent to which this decision of the Court resulted in hampering the administration of justice was interestingly commented on by District Judge Peters:[2]

[1] As late as 1825, William Rawle in his *Constitution of the United States* strenuously urged that the United States still possessed a common law criminal jurisdiction.

[2] *Pickering Papers MSS*, letters of March 20 and April 14, 1816, hitherto unpublished.

Under a late decision of that Court, to which I am bound to submit, *I cannot carry on the business of my district.* It meets me in almost every criminal case. Unless some legislative authority be given to define crimes or statutory descriptions be established, the whole (or nearly) of our criminal code may be expunged. Treason is defined by the Constitution; but most other crimes are barely named, tho' their punishments are, for the most part, prescribed. We are forbidden to resort to common law for interpretation, and our jurisdiction of crimes punishable at common law is excluded. I live in a district of mixed population; as to seamen particularly, I am subject to constant necessity of taking cognizance of crimes, great and small, without a guide to direct my course. I had little difficulty before the occasion alluded to; but now my hands are tied, and my mind padlocked. . . . Whilst the opinion that we had no common law jurisdiction in criminal cases was held by some and denied by others, I thought myself justified in following my own. But now I am bound by overruling decision to avoid acting under my own sentiments. . . . Every crime, not defined in our statutes,—murder, rape, all the less offences may be committed with impunity in places under the exclusive jurisdiction of the United States. If a tourist had given this account of us on his return to a foreign country, there would have been a general outcry here that he was a libeller. Yet such an account would have been true; and an exception to the general habits of travellers thro' our country. . . . Our National criminal code is *lucus a non lucendo.* . . . If it were not too serious and tragical in its consequences . . . it would be a perfect mockery and ridicule on public criminal law.

Disappointed at the result of the *Coolidge Case*, Judge Story became even more anxious than before to obtain Congressional legislation "to delegate authority in general terms over crimes." This was not seeking to assume a general common law jurisdiction, he wrote. "It is still competent for Congress to adopt as to its own powers an exercise of common law principles. . . . I believe that none of us (Judges) entertain any doubt as

to the authority of Congress to invest us with this jurisdiction, so far as it applies to the sovereignty of the United States." [1] Accordingly, he drafted in 1816 a bill "further to extend the judicial system of the United States", which was revised by Marshall and Bushrod Washington and approved by the other Judges (except Johnson). It was designed to give to the Circuit Courts jurisdiction "in all cases in law and equity arising under the Constitution, the laws of the United States, and under treaties made or to be made under its authority" (a jurisdiction which in fact Congress did not grant until sixty years later) and also to grant general jurisdiction to punish crimes committed against the Federal Government, making those common law crimes which violated its sovereignty punishable, without attempting to enumerate and define specific offenses. Congress, however, failed to enact this statute or any legislation on the subject; and the gaps which existed in the Federal criminal law continued to be pointed out by the Court, as cases arose,[2] until finally in 1825, a more complete Crimes Act (drafted by Story, and supported by Webster) was enacted which more adequately, though still far from completely, gave protection to the Federal sovereignty.[3]

At this very period when the powers of the Federal Government had been thus considerably weakened by the Court's decision in the *Coolidge Case*, by the absence of adequate Federal criminal legislation, and by the serious and long-continued attacks upon the Federal authority in the Northern States, a case now came before the Court, in 1816, on writ of error to a State

[1] *Story*, I, 293, 298–300.

[2] See for instance *United States* v. *Bevens* (1818), 3 Wheat. 336; *United States* v. *Wiltberger* (1820), 5 Wheat. 76.

[3] This Act of March 3, 1825, was originally drafted by Story, in 1818. See *Story*, I, 437.

Court in Virginia, which involved a still more vital impairment of Federal supremacy, should the doctrine contended for by the State Court prevail. In this case of *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, a State for the first time asserted the unconstitutionality of the jurisdiction of the Court on writs of error to the State Courts. Such Federal power of revision granted by the original Judiciary Act of 1789 had been deemed by the statesmen of the First Congress to be necessary in order to promote uniformity of law and to insure supremacy of the Federal Government in National affairs.[1] It constituted, nevertheless, undoubtedly a marked impairment of State sovereignty; and in view of the extreme jealousy shown by the States from the outset towards the Federal Government, it is a singular fact in our history that this Section was in force twenty-four years before any State resented its existence or attempted to controvert the right of Congress to enact it. During these years from 1789 to 1813, the Court had taken jurisdiction of writs of error to State Courts in sixteen cases, without serious opposition of counsel or of such Courts. As late as 1809, so ardent an upholder of State-Rights as the Virginia Legislature deliberately resolved, in answer to Pennsylvania's assertion of State sovereignty in its conflict with United States District Judge Peters, that for the determination of disputes between the General and State Governments, "a tribunal is already provided by the Constitution of the United States (to wit, the Supreme Court) more eminently qualified to decide the disputes aforesaid in an enlightened and impartial manner than any other tribunal which could be created." In 1812, New Jersey had accepted without a murmur a decision of the Court invalidating a State statute on writ of error to the State

[1] See Introductory Chapter, *supra*, 10–20.

Court.[1] It remained for the State of Virginia in 1814 to be the first to question the validity of this statute, and by decision of its highest State Court to decline to comply with a mandate of the Supreme Court of the United States in a case coming before it on writ of error under the law. Such action and such a reversal of policy in a State which had contributed three Judges to the Court, and which contained a larger proportion of eminent lawyers than any other State (except Pennsylvania) in the Union, can only be understood by a consideration of the particular matters which were at stake in the case — immense and valuable landed properties, the State confiscation acts and the unpopular treaties with Great Britain protecting British creditors — matters which were of vital interest to large numbers of Virginians, and which had long been the subject of heated political contest. The direct issue was the title to certain rich timber and tobacco lands on the Potomac River in Shenandoah County and the Northern Neck of Virginia, formerly belonging to Lord Fairfax, who had died in England in 1781, devising his Virginia estates to his nephew, Denny Martin. The State of Virginia, denying the right of an alien to inherit, and also claiming to have confiscated the estate in 1777, granted a part of the land in 1789 to one David Hunter; and from this grant, there arose the long series of cases which culminated in the final decision by the Supreme Court of the United States in 1816, upholding the supreme rights of the National Judiciary to adjudicate questions involving a Federal law or treaty, even when arising in State Court. The controversy had originated

[1] *New Jersey* v. *Wilson*, 7 Cranch, 164. The first case on writ of error to a State Court was *Olney* v. *Arnold*, 3 Dallas, 308, at the August, 1797, Term, involving the construction of the Federal Statute by a Rhode Island Court: the first case on writ of error to a State Court in which a State law was held invalid was *Clerke* v. *Harwood*, 3 Dallas, 342, in 1797, a Maryland law as to British debts being held to conflict with a treaty.

as early as the year 1791, when Hunter brought a suit in ejectment against Martin in the Superior Court for Shenandoah County in Virginia, John Marshall representing Martin.[1] Decisions adverse to the claimant were given in the lower Court in 1794, and in the Virginia Court of Appeals in May, 1796, and the case came before the United States Supreme Court at the August Term, in 1796, on writ of error to the State Court, but was never argued.[2] Thirteen years later, the case came again before the Virginia Court of Appeals, in October, 1809, and on April 23, 1810, that Court demolished the Fairfax title, opinions sustaining the Hunter claim being rendered by Judge Fleming, and by Judge Spencer Roane — the latter a bitter opponent of Marshall's, a passionate Republican, and a son-in-law of Patrick Henry.[3] A writ of error was at once sued out in the United States Supreme Court and the record of the case was certified by the Virginia Court of Appeals in response to the Federal writ, without the slightest demur to the power or jurisdiction of the Federal Court to issue such a writ. This case, *Fairfax's Devisee* v. *Hunter's Lessee*, 7 Cranch, 602, was argued by Charles

[1] See *Hunter* v. *Fairfax's Devisee*, 1 Munford, 218. The claim was based, first, on the original invalid title of Lord Fairfax, second, on the confiscation by Virginia, third, on the inability of an alien to devise land in Virginia to an alien. Marshall had previously represented certain Virginia citizens who claimed as purchasers under Lord Fairfax. See *Hite* v. *Fairfax*, 4 Call. 42, in 1786.

[2] *Hunter* v. *Fairfax's Devisee*, 3 Dallas, 305. Charles Lee of Virginia and Jared Ingersoll of Pennsylvania appeared and argued against a continuance which was sought because of the death of Hunter's distinguished counsel Alexander Campbell of Virginia. The Court, remarking that the cause was one of magnitude, granted the continuance. *Supra*, 151-153.

[3] For detailed accounts of the relations of John Marshall to this case, see *Marshall*, IV, Chap. 3; *History of the Supreme Court* (1912), by Gustavus Myers. Myers alleges that John Marshall was a part owner of the lands claimed by Hunter; and Judge Roane apparently took this view of the case. On the other hand, Beveridge asserts that Marshall's brother, James M. Marshall, was alone interested in the land in question, although John Marshall was owner of other land purchased from Lord Fairfax. It is difficult on the evidence to determine the real fact. But John Marshall, at all events, declined to sit at the argument or to take part in the decision in the Supreme Court.

Lee and Walter Jones against Robert G. Harper. The Court took a year to consider, and on March 15, 1813, rendered its opinion through Judge Story, reversing the judgment of the Virginia Court of Appeals. Even if the decision had not dealt with a topic containing elements socially and politically explosive, the manner in which it was rendered would undoubtedly have caused considerable dissatisfaction; for Chief Justice Marshall and Judge Washington absented themselves from the argument; Judge Todd was absent at the decision; and Judge Johnson dissented. It would appear, therefore, that the judgment, concurred in by Story, Livingston and Duval only, was that of less than a majority of the full Court. In the second place, the decision that an alien could take land in Virginia by devise was contrary to both the sentiment of the people and the law as laid down by the State Courts; and it is doubtful whether, in later years, the Court would not have felt bound to accept the State law on this point. In the third place, Judge Story gave a construction to the State confiscation statutes which practically emasculated them and again ran counter to State Court decisions. There was, therefore, every element present in the case to weaken the confidence and wound the pride of the State. When the mandate of the Federal Court issued, the question was then for the first time raised in the State Court whether the former Court had the power to exercise jurisdiction over the latter's judgment, and whether obedience should be given to the mandate. In other words, was the Judiciary Act constitutional? These points were argued at length before the Court of Appeals of Virginia in April, 1814; and the Reporter in reporting this argument said: "The question whether this mandate should be obeyed excited all that attention from the Bench and Bar which its great importance

truly merited."[1] It was indeed of momentous consequence, as the right of a State Court to disobey the mandate of the Federal Supreme tribunal and the right of that State Court to decide for itself the constitutionality of the Federal Judiciary Act were directly contended for. It was not until December, 1815, a year and a half after the argument, that the decision was finally rendered.[2] The Judges were unanimous in holding that: "The appellate power of the Supreme Court of the United States does not extend to this Court under a sound construction of the Constitution of the United States; that so much of the Twenty-fifth Section of the Act . . . to establish the Judicial Courts of the United States as extends the appellate jurisdiction of the Supreme Court to this Court, is not in pursuance of the Constitution of the United States; that the writ of error in this case was improvidently allowed under the authority of that Act; that the proceedings thereon in the Supreme Court were *coram non judice* in relation to this Court; and that obedience to its mandate be declined by this Court." Judge Cabell said the Court "should decline obedience to the mandate"; Judge Brooke, that "obedience to the mandate ought to be refused"; Judge Fleming, that "it is inexpedient for this Court to obey the mandate"; Judge Roane said that "this Court is both at liberty and is bound to follow its own convictions on the subject," and he continued with strong expression of the radical State-Rights view of the situation. After stating that the Court had called in members of the Bar to investigate the question for its information and had given it "long and deliberate consideration", he said:

[1] See 4 Munford, 3.

[2] The Reporter stated: "This opinion was prepared and ready to be delivered shortly after the argument. The crisis referred to has now happily passed away."

This course of the Court, to say nothing of its general character, should have spared the appellee's counsel the trouble of exhorting this High Tribunal to divest itself of all improper prejudices, in deciding on this important question. Those counsel were also pleased to warn us of the consequences of a decision, one way, in reference principally to the anarchical principles prevalent at the time of the argument in a particular section of the Union. They ought to have remembered that this Court did not select the time for bringing this case to a decision, and that it is not for it to regard political consequences, in rendering its judgment. They should also have recollected that there is a Charybdis to be avoided, as well as a Scylla; that a centripetal, as well as a centrifugal principle, exists in the Government; and that no calamity would be more to be deplored by the American people, than a vortex in the General Government, which should ingulph and sweep away every vestige of the State Constitutions.

The refusal of the Virginia Court to comply with the mandate was brought, on another writ of error, to the Supreme Court in 1816, *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, and was argued by Walter Jones against St. George Tucker of Virginia and Samuel Dexter of Massachusetts. Both the latter counsel, upholding the State Court, took the position that although the Constitution provided that the judicial power "shall extend to all cases in law or equity" arising under the Constitution, laws and treaties of the United States, nevertheless, Congress had no power to give to the Court appellate jurisdiction from the State Courts; Tucker claiming that Congress could only enable parties claiming under the Constitution, laws, or treaties to sue in Federal Courts; and Dexter taking the ground that Congress could provide, but had not done so, for removal from a State Court into a Federal Court of all suits involving the laws, treaties, and Constitution. Dexter, however, was insistent that the Judiciary Act (a law which, he

claimed, had been "improvidently assented to" by President Washington and those who advised him) was "neither constitutionally nor politically adapted to enforce the powers of the National Courts in an amicable and pacific manner"; and he pointed out the dangers of friction between the States and the Federal Government which might arise from the exercise of appellate jurisdiction. "The taper of judicial discord," he said, "may become the torch of civil war, and though the breath of a Judge can extinguish the first, the wisdom of the statesman may not quench the latter." He expressed his regret, however, that "the Courts of so patriotic a State as Virginia have denied the complete and exclusive dominion of the National Government over the whole surface of the judicial power granted by the people to that government." He had never feared that the Government was too strong, but rather that it was not strong enough; but he said: "Though I will struggle to preserve all the constitutional powers of the National Government, I will not strain and break the Constitution itself in order to assert them."

On March 20, 1816, Judge Story rendered the opinion of the Court, an opinion which has ever since been the keystone of the whole arch of Federal judicial power. "The questions involved in this judgment," he said at the outset, "are of great importance and delicacy. Perhaps, it is not too much to affirm that upon their right decision, rest some of the most solid principles which have hitherto been supposed to sustain and protect the Constitution itself," and he added that the deference felt by the Court towards the Virginia Court increased the difficulty of the task "which has so unwelcomely fallen upon us." After an exhaustive consideration of the wording of the Constitution, and of the intent of its framers, the Court reached the con-

clusion that that instrument gave to Congress the right to confer appellate jurisdiction upon the Supreme Court in all cases involving the laws, treaties and Constitution of the United States, and that such jurisdiction was dependent on the nature of the case rather than on the particular Court in which the case was pending. It further held that the existence of such power, if it did in fact impair the sovereignty of the States or the independence of their Courts, was only one instance, of many, in which the People of the United States, by adopting the Constitution, intentionally deprived the States of a portion of their sovereignty, in order to erect and preserve an effective National Government. Judge Johnson, in an eloquent concurring opinion, termed the question "one of the most momentous importance, as one which may affect, in its consequences, the permanence of the American Union. It presents an instance of collision between the judicial powers of the Union and one of the greatest States in the Union," but, he said, "the General Government must cease to exist, whenever it loses the power of protecting itself in the exercise of its constitutional powers." Finally, holding the Judiciary Act to be constitutional, and reversing the judgment of the Virginia Court of Appeals, the Court decided to avoid the chance of further friction with that Court, and accordingly, instead of issuing a second mandate to that Court, it issued its process directly to the District Court of Shenandoah County, in which the suit had been originally instituted.[1]

The vital effect upon the history of the United States of this courageous maintenance of Federal supremacy and of the constitutional powers of the Federal Judiciary

[1] In two other cases the Court has felt obliged to issue its mandate directly to the Court where the suit originated, owing to a failure of the highest tribunal of the State to comply with a mandate. See *Tyler* v. *Magwire* (1873), 17 Wall. 253; and *Williams* v. *Bruffy* (1880), 102 U. S. 248.

can hardly be over-emphasized, and it should be noted that this decision was rendered by a Republican Judge and a Court consisting of five Republicans and one Federalist (Chief Justice Marshall not sitting). It has sometimes been charged that Story, in rendering this strongly Federal opinion, was controlled by the overmastering mind and influence of Marshall. The absurdity of this charge, however, is made clear when Judge Story's personal views, previously expressed by him, are studied. And it is unquestionably a fact that it was Story's personal experiences with the repeated attacks upon and violations of the Federal law in New England, which had revealed to him the weakness of the Federal Government and impressed upon his mind the need of an assertion to the utmost of every power which the Constitution lawfully conferred upon the various branches of that Government. Of his insistence that Congress should provide adequate criminal statutes to punish those who resisted the Federal authority in 1812 and 1813, mention has already been made. "Do not suffer conspiracies to destroy the Union to be formed in the bosom of the country and no laws exist to punish them," he had written. "I love the Constitution; it is the bulwark of our liberties, and it would grieve my soul most deeply and bitterly to have it crushed by factions; the laws ought to be made to reach all public crimes." "The Government will be completely prostrated unless they give jurisdiction to their Courts and a common law authority to punish crimes." [1] Story had also witnessed personally the attacks upon the Courts in Massachusetts, and he had written in 1813 of "the attempts to break down the Judiciary of the United States through the newspapers, and mean and miserable insinuations are made to weaken the authority of its judg-

[1] *Story*, I, 247, letter of Aug. 13, 1813.

ments. . . . I can perceive a path which, without a great sacrifice of what the world would deem equity, might make me a very popular Judge of the Court at this moment; but I have great fears as to the character of a popular Judge in these times. I prefer to meet the present prejudices, rather than hereafter to suffer the deepest regrets for judgments which I could not sustain upon principles of law or upon conscientious errors of reasoning." Before he had been on the Bench four years, he had become convinced of the necessity of a strong central Government, and he had written to a friend in that year: "Let us extend the National authority over the whole extent of power given by the Constitution. Let us have great military and naval schools; an adequate regular army; the broad foundations laid of a navy; a National bank; a National system of bankruptcy; a great navigation act; a general survey of our ports, and appointments of port wardens and pilots; Judicial Courts which shall embrace the whole constitutional powers. . . . By such enlarged and liberal institutions, this Government of the United States will be endeared to the people, and the faction of the great States will be rendered harmless. Let us prevent the possibility of a division, by creating great National interests which shall bind us in an indissoluble chain." Morever, in the very year in which he rendered his opinion in the Virginia case, Story had shown how firmly rooted were his views as to the need of Federal supremacy, in a memorandum for a proposed Federal statute:[1] "Nothing can better tend to promote the harmony of the States, and cement the Union (already too feebly supported) than an exercise of all the powers legitimately confided to the General Govern-

[1] *Story*, I, 253, letter of Feb. 22, 1815, *id.*, 295, memorandum in favor of a bill to extend the judicial system of the United States.

ment, and the judicial power is that which must always form a strong and stringent link. . . . Let not the dignity of the Government or of its officers be sunk so low that its authority may be scoffed at and denied with impunity . . . I hold it to be a maxim . . . that the Government of the United States is intrinsically too weak, and the powers of the State Governments too strong; that the danger always is much greater of anarchy in the parts, than of tyranny in the head." Thus, not a single view was expressed by Judge Story in his opinion in the Virginia case which he had not already entertained and expressed for several years previous. It was the Federalist lawbreakers and traitors of New England who produced the decision in *Martin* v. *Hunter's Lessee*, and not the pressure of Marshall's influence. It was the "crisis" and "anarchical principles", prevailing in Massachusetts and referred to by Judge Roane in the Virginia Court, which made Story's decision peculiarly opportune. And that its affirmance of the constitutional jurisdiction of the Court was not directed against Virginia alone may be seen from the fact that the Supreme Court of Massachusetts, in a decision rendered shortly after that decision of the Virginia Court of Appeals, had intimated that it also considered the appellate jurisdiction under the Judiciary Act to be "a question of much doubt and argument." [1]

Story's decision, thus, disposed of attacks upon the authority of the Court from both North and South.

[1] *Weatherbee* v. *Johnson* (1817), 14 Mass. 417, saying: "The power claimed by the Supreme Court of the United States, has been denied by the highest Court of law in Virginia. The Justices of that Court think it never was the intention of the Constitution of the United States to consider the Supreme Court of the several States as tribunals inferior to the Courts of the United States; or that a privilege was given to a defendant who had submitted to the jurisdiction of a State Court, taken his trial there, and finally failed in his defense, to harass his adversary by intercepting the remedy, which he may have obtained at great expense, and carrying his case to a tribunal whose sessions would be at the seat of the National Government, perhaps a thousand miles distant from the place of his residence."

CHAPTER TEN

THE JUDGES AND THE COURT-ROOMS

1800–1816

The close of the 1816 Term marked a very distinct period in the history of the Court and of American law. For with the end of the war came the turning of the attention of the American people from agriculture and shipping to manufactures; manufacturing corporations came into being; inventions increased, accompanied by the growth of the patent system and patent laws; turnpikes, canals, and railroads developed the means of communication through the country. All these important economic changes produced novel legal problems, and especially in the cases presenting great constitutional questions which arose out of the new financial and business conditions. During the fifteen years, however, from 1800 to 1816, the subjects of litigation with which the Court had been called to deal had been very limited. Of the four hundred cases decided by it, one quarter had involved questions of war, neutrality, prize, embargo and non-intercourse; nearly another quarter had involved mere questions of practice or procedure; eleven presented questions of slavery; ten, of citizenship, and only a scant half dozen presented any constitutional question.

With the close of the 1816 Term, there also came to an end the series of reports published unofficially by William Cranch (then Judge of the Circuit Court

of the District of Columbia); and for the first time an official Reporter, Henry Wheaton of New York, was appointed by the Court, under a new law enacted in 1816.[1] In considering the effect of the decisions of the Court during this early period, it must be constantly borne in mind that, except so far as the opinions were published in the newspapers, little was known of them by the general public or even by the Bar. The newspaper publications and comments, therefore, were the great factor in forming public sentiment regarding the Court.[2] Many years elapsed before the Supreme Court Reports obtained any wide sale or circulation among lawyers. Even as late as 1830, the Reporter, Richard Peters, stated that "few copies were found in many large districts of the country. In some of these districts, not a single copy of the reports are in the possession of anyone", and he urged a greater circulation, in order to disseminate "knowledge of the labours and usefulness of this tribunal", and to produce "a corresponding increase with the people of the United States of their attachment and veneration for this department of their government.

[1] By Act of March 22, 1816, provision was made for the first time for an official publication of the decisions of the Court, but with no provision for a salary to the Reporter. By Act of March 3, 1817, to remain in force three years, provision was made for a Reporter with a salary of $1000. This measure was warmly supported by Chief Justice Marshall, who wrote a letter to the Senate, Feb. 7, 1817. *Amer. State Papers, Misc.*, II, No. 426.

[2] In 1816, according to Webster's argument in *Wheaton* v. *Peters*, 8 Peters, 651, Mr. Cranch's reports had been published as far as the sixth volume; the rest of the matter which afterwards formed the remaining volumes was in manuscript.

Not until March 14, 1834, was there any order that all opinions of the Court must be filed with the Clerk. See 8 Peters, vii. Under this rule, the MSS record of opinions begins with the January Term, 1835. The printed record does not begin until the December Term, 1857. The practice of delivering opinions in writing was exceptional at first, but by the time of Cranch had become the rule. There is no means of knowing whether in the time of Dallas and Cranch, the Court delivered any written opinions which the Reporter failed to report. It is certain from Wheaton's own preface that he used his discretion in omitting some cases from which no important question or general rule could be extracted. Peters probably reported nearly everything. 131 U. S. Appendix xvi, xvii.

Few of our citizens know what this Court has done for them." [1]

A new era for the Court with respect to its place of session began also with the end of the 1816 Term; for owing to the burning of the Capitol in the previous year it became necessary to reconstruct the Court-room. As early as 1805, the small room originally occupied by it on the first floor of the Capitol had become wholly insufficient. "The crowd of citizens that sometimes attend the Court and necessarily fill the passages and vestibules disturb the Legislative proceedings as well"; [2] reported Latrobe, the architect and Surveyor of Public Buildings; and in 1806, he proposed a plan to appropriate the whole basement story to the use of the Judiciary, and to raise the floor of the Senate Chamber to the level of the first or principal story. By 1808, the North Wing of the Capitol, especially the Senate Chamber itself, had fallen into great disrepair; and Latrobe reported that: "The accommodations of the Senate and of the Court are very far from being convenient for the dispatch of public business. . . . The present chamber of the Senate cannot be considered as altogether safe, either as to the plastering, of which the columns and entablature consist, or as to the floors and ceiling." President Jefferson suggested an entire reconstruction of the Senate Chamber, by laying a new floor at the level of the Senate Gallery, removing the ceiling so as to give additional elevation to the new Chamber, replacing with stone and brick the columns and arches which were then of wood and stucco, and

[1] Daniel Webster reviewing Volume Three of Wheaton in 1818, said: "The sale is not very rapid. The number of law libraries which contain a complete set is comparatively small." *North Amer. Rev.* (1818), VIII; *Amer. Quart. Rev.* (1830), VII.

[2] *Report of Surveyor of Public Buildings*, transmitted by the President to Congress, Dec. 27, 1805.

by devoting the room thus formed below in the basement to the use of the Court.[1] This work was begun in 1808–1809, and during its progress the Court sat in the room on the west side of the main floor, which had previously been occupied by the House of Representatives and later by the Library of Congress. It appears thus that the second Court-room was the quarters now occupied by the Clerk of the Court. At the close of the 1809 Term, the Court vacated this room, and it was turned over to the Senate for its May special session.[2] During the February Term of 1810, the repairs had been so far completed that the Court again moved its quarters,[3] and sat in the new, and third, Court-room on the basement floor underneath the new Senate Chamber, a vivid description of which was written by the noted Philadelphia lawyer, Charles J. Ingersoll: "Under the Senate Chamber, is the Hall of Justice, the ceiling of which is not unfanci-

[1] Letter of Jefferson to Latrobe, July 25, 1808, quoted in *History of the Capitol* (1900), by Glenn Brown, 25, 44; see also *10th Cong., 1st Sess.*, 27, 49 *et seq.*

[2] During the construction of the new Court-room, the vault fell in, killing the superintendent of the work. See *Connecticut Courant*, Sept. 28, 1808. A report on the Capitol made to the Senate in 1809, stated: "I therefore propose to you to remove the rough seats, benches and enclosures, erected for the accommodation of the Supreme Court . . . and thus, at a moderate expense, to provide a chamber which will unite every requisite of convenience and comfort, and will enable the Senate to await, without being in the smallest degree incommoded by the delay, the completion of the permanent chamber." *Documentary History of the Capitol* (1904), 154, 162.

It is probable that during part of 1809 or 1810, the Court may have sat for a part of the time in one of the Washington hotels; for in a letter from Latrobe, on January 3, 1811, there occurs the following reference: "The expense of fitting up and furnishing the Court-room, having never been estimated by me or contemplated by the words of any law making appropriation for the public buildings, I took no steps whatever to fit up and furnish the room, until the propriety of so doing was urged by the Judges of the Courts, who had been obliged to hold their sittings at a tavern. I then understood that the contingent fund of the Judiciary was liable to this expense . . . under these impressions, the Court-room was fitted up and furnished. . . ." This would appear to be a positive statement that the Judges of the Courts had held their sittings at a tavern.

[3] Latrobe in his report, Dec. 11, 1809, says: "The Court-room, the office of the Clerk of the Supreme Court and the office and library of the Judges have also been completed and may be occupied the approaching session of the Court."

fully formed by the arches that support the former. The Judges in their robes of solemn black are raised on seats of grave mahogany; and below them is the bar; and behind that an arcade, still higher, so contrived as to afford auditors double rows of terrace seats thrown in segments round the transverse arch under which the Judges sit. . . . When I went into the Court of Justice yesterday, one side of the fine forensic colonnade was occupied by a party of ladies, who, after loitering some time in the gallery of the Representatives, had sauntered into the hall, and were, with their attendants sacrificing some impatient moments to the inscrutable mysteries of pleading. On the opposite side was a group of Indians, who are here on a visit to the President (papa of the savages) in their native costume, their straight black hair hanging in plaits down their tawny shoulders, with mockassins on their feet, rings in their ears and noses, and large plates of silver on their arms and breasts." [1] Above this Court-room was the Senate Chamber, on whose walls there hung, from 1800 to 1814, the portraits of Louis XVI and Marie Antoinette, which had been presented to the Continental Congress in 1784. That the walls of the room which has now become the home of the Court were, in former days, thus embellished adds a touch of romance to that severe and impressive sanctuary.[2]

On August 24, 1814, the Capitol was burned by the British troops, being set on fire by means of rockets,

[1] *Inchiquin, the Jesuit's Letters* (1810), by Charles J. Ingersoll.

[2] For references to these portraits see *History of the National Capitol* (1914), by J. W. Bryan; *Diary of Mr. William Thornton*, in *Columbia Hist. Soc. Proc.* (1907), X; (1911), XIV; *Sketches of Debate in the First Senate of the United States*, by William Maclay, entry of Feb. 26, 1791; *13th Cong., 1st Sess.*, July 19, 1813, resolve introduced by Mr. Bledsoe; Aug. 1, 1813, resolve of the Senate. The latest reference to the portraits is in a letter of June 20, 1842, stating that they had been removed from the rotunda; see *Col. Hist. Soc. Rec.* (1914), XVII.

tar barrels found in the neighborhood, broken furniture, and heaps of books from the library. "Great efforts were made to destroy the Court-room, which was built with uncommon solidity, by collecting into it and setting fire to the furniture of the adjacent rooms. By this means, the columns were cracked exceedingly, but it still stood and the vault was uninjured. It was, however, very slenderly supported and its condition dangerous," reported Latrobe, the architect, later.[1] Although the Thirteenth Congress met in special session on September 19, 1814, in a building used for a hotel on the corner of Eighth and E Streets, N.W., and although it later occupied a building especially erected for its use at the corner of A and First Streets, N.E. (known as the "Brick Capitol"), it neglected to make any provision for the Judicial branch of the Government. Hence, during the 1815 Term, the Court was forced to seek temporary quarters in a large double house on the site of 204–206 Pennsylvania Avenue, S.E., then occupied by its Clerk, Elias Boudinot Caldwell, and located east of the present Capitol and south of the "Brick Capitol."[2] In the 1817 and 1818 Terms, the Court sat in an office temporarily prepared for its use in the less ruined portion of the North Wing of the Capitol — a room variously described as "a mean apartment of moderate size", "a mean and dingy building", "little better than a dungeon."[3] These

[1] *History of the Capitol* (1900), by Glenn Brown, 48, report of Latrobe to Congress, Nov. 28, 1816.

[2] Jeremiah Mason wrote to Rufus King, Dec. 15, 1816: "Bailey, a reformed gambler from Virginia, has taken and fitted for a tavern the house south of the Old Capitol where the Supreme Court held their session last winter, together with the house adjoining." *Correspondence of Jeremiah Mason* (1873), by George A. Hillard.

[3] *Works of Rufus Choate* (1862), I, 514, giving Chauncey Goodrich's description; *Congressional Reminiscences* (1882), by John Wentworth, giving Webster's description; see also *History of Washington* (1914), by W. B. Bryan, II, 37, 38.

were thus its fourth and fifth Court-rooms. By 1819, the rebuilding of the Capitol was complete enough to allow the Court to move back into the room below the Senate, of which a contemporary newspaper wrote as follows: "We are highly pleased to find that the Court-room in the Capitol is in a state fit for the reception of the Supreme Court. We shall not pretend to describe in the terms of art the structure and decoration of this apartment, though we will endeavor to prevail on some qualified person to do it for us. It is such as to have an effect on the beholder, considerably more agreeable than that which was produced on entering the same apartment, previous to the re-modification of it made necessary by the conflagration of the interior of the Capitol." [1] A less complimentary but more vivid picture of the new Court-room was given by a New York newspaper correspondent, five years later, in 1824, at the time of the argument of the noted case of *Gibbons* v. *Ogden*.[2] "The apartment is not in a style which comports with the dignity of that body, or which wears a comparison with the other Halls of the Capitol. In the first place, it is like going down cellar to reach it. The room is on the basement story in an obscure part of the north wing. In arriving at it, you pass a labyrinth, and almost need the clue of Ariadne to guide you to the sanctuary of the blind

[1] *National Intelligencer*, Feb. 2, 1819.

[2] *New York Statesman*, Feb. 7, 24, 1824; see also description in 1827 by Oliver Hampton Smith, Senator from Indiana, in *Early Indiana Trials and Sketches* (1858). "The Judgment hall with its low browed roof and short columns modelled after the prison of Constance in Marmion." *Travels in Canada and the United States* (1818), by Lieut. Francis Hall. "By no means a large or handsome apartment; and the lowness of the ceiling and the circumstances of its being under ground, give it a certain cellarlike aspect, which is not pleasant. This is, perhaps, unfortunate, because it tends to create in the spectator the impression of justice being done in a corner." *Men and Manners in America* (1833), by Thomas Hamilton; see also *Travels through West of the United States and Canada in 1818 and 1819* (1823), by John M. Duncan.

goddess. A stranger might traverse the dark avenues of the Capitol for a week, without finding the remote corner in which Justice is administered to the American Republic . . . a room which is hardly capacious enough for a ward justice. The apartment is well finished; but the experience of this day has shown that in size it is wholly insufficient for the accommodation of the Bar, and the spectators who wish to attend. Many of the members were obliged to leave their seats to make room for the ladies, some of whom were *sworn in*, and with much difficulty found places within the Bar. It is a triangular, semi-circular, odd-shaped apartment, with three windows, and a profusion of arches in the ceiling, diverging like the radii of a circle from a point over the bench to the circumference. . . . Owing to the smallness of the room, the Judges are compelled to put on their robes in the presence of the spectators, which is an awkward ceremony, and destroys the effect intended to be produced by assuming the gown. The appurtenances of the Court are in no wise superior to the apartment itself. Two brown stone pitchers with a few glasses to furnish the speakers with water are the only movables in the room; and the fixtures are not very remarkable for conveniences or elegance." The Judges sat on a long seat at the east end of the room on a raised platform. The floor of the bar, three feet lower, was carpeted, and on it was a long table in front of the Judges with cushioned roller armchairs for the lawyers. The Attorney-General sat at the right of the Judges, the Clerk at the left, the Marshal at the platform on the left. In front of the Judges on the opposite wall was a marble bas-relief depicting Fame crowned with the rising sun and pointing to the Constitution, and Justice holding the scales

evenly balanced." [1] The following description of the room was made in 1842: "The light is admitted from the east and falls too full upon the attorney who is addressing the Court. This has been somewhat softened by transparent curtains and Venetian blinds. On the wall in a recess in front of the bench is sculptured in bold relief, the figure of Justice holding the scales

[1] In *Sketches of Public Characters* (1830), by Ignatius Loyola Robertson (Samuel L. Knapp), an amusing description of this bas-relief by Franzoni, reproduction of which now appears on the engraved certificates of admission to practice before the Supreme Court, is given as follows: "The ornaments of the Court Room are not numerous. The only one worthy of particular attention is a group opposite the bench of justice. On the left, as seen from the bench, is a figure too lank and lean for a cupid or an angel; but it is probably intended for one or the other of these supernatural beings, or perhaps for the Genius of the Constitution. The figure has wings, and holds the Constitution of the United States in its hand. On the head of this figure, whatever it may be, is a glory or a schekina. This is in bad taste. It is attempting too much, and therefore produces a failure. All the other parts of the design are classical. This is from sacred history. The middle figure is Justice sitting on a chair (Phidias or Praxiteles knew nothing of such a seat for the goddess) with her right arm leaning on her sword, and holding the equal scales in her left. The face of this figure is excellent, and the drapery flowing and easy. Her proportions are rather more delicate than those in which the ancients exhibited the inflexible goddess. Before her sits the bird of wisdom, perched near some volumes of law; but the owl is formed in the modern school, and the Capitol to a groat, Minerva would not know her bird if she should see him so beaked, so feathered, so trim and dovelike, unless she should guess it out by recognizing her sister Justice, in the form of this belle, or resort to her divinity to discover the whole group in their transformation." And in the *New York Statesman*, Feb. 7, 1824, another picturesque comment was made as to this bas-relief: "It is a remarkable circumstance in this allegorical representation that the bandage is removed from the eyes of Justice, and her hand, instead of delicately holding the scales of justice, firmly grasps the beam in such a way as to prevent the balance from vibrating, whatever may be the weight thrown into either scale. This grotesque device gave rise to the following *jeu d'esprit* which appeared in the *Intelligencer:*

A naked non-descript upon whose head
The sun is pouring his unsparing rays,
Whose two huge wings in vain he strives to spread
For shelter from so bold and broad a blaze.
'Graved by the lithographic art on stone
The Statesman's plaything, dandled on his arm,
Obliterate all but the bare name alone
In which exists its all-sufficient charm.
Next him sits Justice, ever broad awake,
(For here they have not thought it fit to blind her),
Who, with an arm too large for weight to break,
Thrusts the scales forward while she looks behind her.
Next her, the Nation's Eagle lifts its claws
And boldly tramples on the prostrate laws."

in front, and that of Fame, crowned with the rising sun, pointing to the Constitution of the United States. On a stone bracket attached to the pier of one of the arches on the left of the fireplace is a fine bust in marble of Chief Justice Ellsworth, and on a similar bracket on the right is a marble bust of Chief Justice Marshall. The members of the Bar are accommodated with mahogany desks and armed chairs within the bar, which is about two feet below the level of the floor of the loggia and lobby, and the audience with sofas, settees and chairs. The Judges have each a mahogany desk and chair." [1]

And just a few years before the Court, in 1860, moved to its present Court-room (the Senate Chamber from 1808 to 1860), a Boston lawyer wrote this impression of its surroundings, in which the interesting statement was made that the Judges did not sit on a substantially elevated bench, as at present: [2] "The part where the Judges sit is divided from the bar by a neat railing; within the bar are four tables, in two rows, for the use of the profession; outside the bar-enclosure are the seats for the visitors and spectators; beyond the railing are the Judges' seats upon pretty nearly a level with the floor of the room, not elevated as are our Judge's seats. By the side of the railing are nine neat desks, and behind them, as many comfortable high-backed chairs for the use of the Judges . . . In an alcove back of the seat of the Chief Justice and nearly up to the ceiling is a small portrait of Chief Justice Marshall."

Of the Judges who occupied these Court-rooms during the Chief Justiceship of Marshall, many striking personal depictions have been given by contem-

[1] *Memories of Washington* (1842), by George Watterston.
[2] *American Law Register* (Oct., 1854), II, 706.

poraries. Joseph Story described their appearance in 1808 as follows. "Marshall is of a tall, slender figure, not graceful nor imposing, but erect and steady. His hair is black, his eyes small and twinkling, his forehead rather low, but his features are in general harmonious. His manners are plain, yet dignified; and an unaffected modesty diffuses itself through all his actions. His dress is very simple, yet neat; his language, chaste but hardly elegant; it does not flow rapidly, but it seldom wants precision. In conversation he is quite familiar, but is occasionally embarrassed by a hesitancy and drawling. His thoughts are always clear and ingenious, sometimes striking, and not often inconclusive; he possessed great subtilty of mind, but it is only occasionally exhibited. I love his laugh, — it is too hearty for an intriguer, — and his good temper and unwearied patience are equally agreeable on the bench and in the study. His genius is, in my opinion, vigorous and powerful, less rapid than discriminating, and less vivid than uniform in its light. He examines the intricacies of a subject with calm and persevering acuteness. He has not the majesty and compactness of thought of Dr. Johnson; but in subtle logic he is no unworthy disciple of David Hume. Washington is of a very short stature, and quite boyish in his appearance. Nothing about him indicates greatness; he converses with simplicity and frankness. But he is highly esteemed as a profound lawyer, and I believe not without reason. His written opinions are composed with ability, and on the bench, he exhibits great promptitude and firmness in decision. It requires intimacy to value him as he deserves. Livingston has a fine Roman face; an aquiline nose, high forehead, bald head, and projecting chin, indicate deep research, strength, and quickness of mind. I have no hesitation

in pronouncing him a very able and independent Judge. He evidently thinks with great solidity, and seizes on the strong points of argument. He is luminous, decisive, earnest and impressive on the bench. In private society he is accessible and easy and enjoys with great good humor the vivacities, if I may coin a word, of the wit and the moralist. Of Chase, I have formerly written. On a nearer view, I am satisfied that the elements of his mind are of the very first excellence; age and infirmity have in some degree impaired them. His manners are coarse, and in appearance harsh; but in reality he abounds with good humor. He loves to croak and grumble, and in the very same breath he amuses you extremely by his anecdotes and pleasantry. His first approach is formidable, but all difficulty vanishes when you once understand him. In person, in manners, in unwieldy strength, in severity of reproof, in real tenderness of heart, and above all in intellect, he is the living, I had almost said the exact, image of Samuel Johnson. To use a provincial expression, I like him hugely. I ought not to pass by Judge Johnson, though I scarcely know how to exhibit him individually. He has a strong mathematical head, and considerable soundness of erudition. He reminds me of Mr. [Levi] Lincoln, and in the character of his mind, he seems to me not dissimilar. He has, however, less of metaphysics, and more of logic. This is the first time of Judge Todd's appearance on the bench, and as he is a modest, retired man, I cannot delineate him. He does not appear to want talents." Seven years later, George Ticknor of Boston wrote, in 1815: "I passed the whole of this morning in the Supreme Court. The room in which the Judges are compelled temporarily to sit is, like everything else that is official, uncomfortable, and unfit for the purposes for which

it is used. They sat — I thought inconveniently — at the upper end; but as they were all dressed in flowing black robes, and were fully powdered, they looked dignified. The Chief Justice of the United States is the first lawyer — if not, indeed, the first *man* in the country. You must then imagine before you a man who is tall to awkwardness, with a large head of hair, which looked as if it had been lately tied or combed, and with dirty boots. You must imagine him, too, with a strangeness in his manners, which arises neither from awkwardness nor from formality, but seems to be a curious compound of both; and then, perhaps, you will have before you a figure something like that of the Chief Justice. His style and tones in conversation are uncommonly mild, gentle, and conciliating; and before I had been with him half an hour, I had forgotten his carelessness of his dress and person, and observed only the quick intelligence of his eye, and the open interest he discovered in the subjects on which he spoke, by the perpetual variations of his countenance.[1] Judge Washington is a little, sharp-faced gentleman, with only one eye, and a profusion of snuff distributed over his face; and Judge Duval very like the late Vice-President." And in 1824 at the argument of *Gibbons* v. *Ogden* a New York newspaper correspondent described the appearance of the Judges who listened to Webster's argument as follows. "At eleven o'clock, you see the Judges, sometimes together, and at others, one at a time, enter the lobby in rear of the bench, and assume their robes, in the same manner as a farmer puts on his frock, or the sportsman his

[1] *Story*, I, 166, letter of Feb. 25, 1808; *Ticknor*, I, 33, 36, letters of Feb. 1, 21, 1815. Samuel G. Goodrich in *Recollections of a Lifetime* (1856), wrote of Marshall in 1820 that "he was tall and thin, with a small face expressive of acuteness and amiability. His personal manner was eminently dignified, yet his brow did not seem to me to indicate the full force of great abilities and lofty moral qualities."

hunting shirt, preparatory to the pursuits of the day. There is commonly an officer in waiting to aid them in slipping on their black gowns, as a servant assists a lady in resuming her hat and mantle in an ante-chamber. . . . In either case, changes of apparel should certainly take place behind the scene. . . . The Court sits from eleven o'clock in the morning until four in the afternoon. It is not only one of the most dignified and enlightened tribunals in the world, but one of the most patient. Counsel are heard in silence for hours, without being stopped or interrupted. If a man talks nonsense, he is soon graduated and passes for what he is worth. If he talks to the point, he will be properly measured, and his talents, discrimination and industry reflected in the opinion of the Court. The Judges of the Court say nothing, but when they are fatigued and worried by a long and pointless argument, displaying a want of logic, a want of acuteness, and a destitution of authorities, their feelings and wishes are sufficiently manifested by their countenances and the manners which are displayed." The Chief Justice was "a large, thick-set, athletic man, with a grave, substantial complexion, and with no prominent features, his hair is of an iron gray, cut short before and tied in a club behind; . . . His external appearance indicates him to be what he is, in fact, a solid and substantial man, without an extraordinary share of genius, taste or elegance." Washington, at Marshall's right hand, had "a sallow countenance, not very strongly marked, but deeply furrowed by the hand of time and bearing the marks of infirm health. He wears his dark, unfrosted hair, long and combed back from his forehead." Todd, next on the right, was "a dark complexioned, good-looking, substantial man." Story, though the youngest on the Bench, looked older "by

reason of his baldness and his glasses . . . below middle-size, of light, airy form, rapid and sprightly in his motions, and polished and courtly in his manners; his countenance indicates genius, affability, versatility of thought, and almost anything but the patient research of the scholar and the gravity and wisdom of the Judge. Yet he is known to have been a laborious, indefatigable, not to say, plodding student, and to be among the first on the Bench for his legal attainments, his literary acquirements, and general knowledge." On Marshall's left hand, Johnson was "a large, athletic, well built man of sixty or upwards, with a full, ruddy and fair countenance, with thin white hair, and partially bald." Duval was "a patriarch in appearance with long, thin, and snowy locks, tall and spare, with a thin visage and prominent features."

Three years after *Gibbons* v. *Ogden*, a lively description of the Court was given as it appeared, at the time of the argument of *Brown* v. *Maryland* in 1827, to an Indiana Congressman who was admitted to practice at that Term.[1] "The House having adjourned over from Friday to Monday, I took Saturday to look into the Supreme Court. . . . I entered the room as the hand of the clock was pointed to eleven. The Judges were just coming in from their side-room. The Marshal met them and robed them with long, black, silk gowns, tied at the neck and reaching to the feet. . . . I had never seen anything like it before. It reminded me of the man who, having repeated several times that he would die at the stake for the religion of his father, was asked, 'What was your father's religion?' 'I do not exactly know, but it was something very solemn.' So with me; I did not exactly know what

[1] *Early Indiana Trials and Sketches; Reminiscences* (1858), by Oliver Hampton Smith.

the gowns were for, but I thought the Court looked very solemn. . . . The Judges were all seated, and the Marshal, in a kind of nasal tone, cried out: "Yea, yea, yea, yea! The Supreme Court of the United States is now in session. All persons having business before the Court, will be heard. God save the United States and this honorable Court! '. . . . Court was opened. Chief Justice Marshall was seated in the middle, on his right were Justices Story, Thompson and Duval; on his left, Washington, Johnson and Trimble. William Wirt, Attorney-General, was at his desk, and the Clerk at his table. . . Chief Justice Marshall . . . was above the common height; his features strongly marked; an eye that spoke the high order of his intellect. He wore a short cue, black coat, breeches buckled at the knee, long, black, silk stockings, and shoes with fine buckles.[1] His manner on the bench was exceedingly kind and courteous to the Bar. He heard with the greatest attention the arguments and authorities of counsel. Judge Bushrod Washington, who sat at the left of the Chief Justice, was a much smaller man than Judge Marshall, vener-

[1] Ben Perley Poore in his *Reminiscences of Sixty Years in the National Metropolis* (1886), described Marshall at this time as "a tall, gaunt man with a small head and bright black eyes. He used to wear an unbrushed, long-skirted black coat, a badly fitting waistcoat and knee breeches, a voluminous white cravat, generally soiled, and black worsted stockings, with low shoes and silver buckles." Mrs. Anne Royall in *The Black Book or A Continuation of Travels in the United States* described Marshall in 1828 as a "slender, keen-made man, of the finest mould, above the common height. . . . His face like his person is thin and rather narrow. . . . His dark, keen eye and his arched brow seem to be the only part of his venerable form that have escaped the ravages of time." The *National Gazette* writing of this Term, March 1, 1827, said: "The Chief Justice is strait and hale, and his mental powers seem to have undergone no decline. There never was a more upright, perhaps never an abler Judge. His elaborate opinions are masterpieces of judicial logic and philosophical law." A comment as to the attitude of the Court made by a correspondent of the *Boston Courier*, about this time, is also notable, that "its method, caution and precision, and a courtesy towards the Bar, in which there is no affectation, cannot fail to strike the mind of every visitor. . . . It is the only place in the Capitol where a safe comparison can be drawn between the intellectual power of individuals." *National Intelligencer*, March 10, 1830.

able in appearance, with a face the index of a long life of laborious thought; his reported opinions show that he had a sound legal mind, but not of the very first order.[1] Judge Story was at that time young-looking, though the hair had left the fore part of his head. He was of the common size of man, fine features, and a countenance marking him as a deep thinker. He was considered at that early day the commercial Judge of the Bench. . . . Judge Gabriel Duval was the oldest-looking man on the Bench. His head was as white as a snow-bank, with a long white cue hanging down to his waist. He did not impress me at the time as being even up to mediocrity on the Bench. Judge Johnson looked like a good-natured fat alderman of fifty-five. I thought he would not kill himself with labour; was rather a surface than a deep Judge. He was a good man, but never ranked with the first intellects on the Bench. Judge Trimble was comparatively a young man at that time, to all appearances of a robust and strong constitution. He looked as if he would be one of the last to be called away, and yet he was one of the first." Of the attitude of the Judges toward counsel, striking comment was made by a Philadelphia lawyer of the period: "The eyes of all the Judges were centred upon the speaker and mind seemed to meet mind through the visual organ. . . . It mattered not by whom the Court was addressed — Mr. Pinckney, Mr. Wirt, Mr. Sergeant, Mr. Binney, Mr. Webster or Mr. Ingersoll, received the same and

[1] Ben Perley Poore described Bushrod Washington as "a small, insignificant looking man deprived of the sight of one eye by excessive study, negligent of dress and an immoderate snuff taker. . . . When Mr. Clay stopped, one day, in an argument and advancing to the bench, took a pinch of snuff from Judge Washington's box, saying, — 'I perceive that your Honor sticks to the Scotch' and then proceeded with his case, it excited astonishment and admiration. 'Sir,' said Mr. Justice Story, in relating the circumstances to a friend, 'I do not believe there is a man in the United States who could have done that, but Mr. Clay.'"

no greater, apparent attention than any second or third rate lawyer arguing his first case. If any difference was manifested, it was rather in favor of the young and inexperienced; or those whose condition appealed to the sympathy of the Judges quite as much as to their judgment." [1]

At this period, the social season of Washington began with the opening of the Supreme Court Term. "The city begins to be gay, but the season of greatest festivity is after the Supreme Court commences its session," wrote a newspaper correspondent in February, 1818. "The arrival of the Judges, counsellors, parties, etc., connected with the High Court creates a great stir in the Metropolis. There are now tea and dining parties daily. The President gives two superb dinners a week, and sees gentlemen on business and etiquette every Wednesday. Every other Wednesday evening Mrs. Monroe holds a drawing room." [2] The Judges of the Court appear to have been assiduous diners-out. "We had the Judiciary company to dine with us, this day," wrote John Quincy Adams, when Secretary of State. "Chief Justice Marshall, the Judges Johnson, Story and Todd, the Attorney-General Wirt, and late District Attorney Walter Jones; also Messrs. Harper, Hopkinson, D. B. Ogden, J. Sergeant, Webster, Wheaton and Winder, all counsellors of the Court. . . . We had a very pleasant and convivial party, and I had occasion to repeat a remark made in former years, that there is more social ease and enjoyment in these companies, when all the guests are familiarly acquainted with one another, than at our usual dinners during the session of Congress, when we have from fifteen to twenty members assembled

[1] *The Forum* (1856), by David Paul Brown, I, 562.
[2] *New York Commercial Advertiser*, Feb. 7, 1818.

from various parts of the Union, and scarcely acquainted together." [1] Charles J. Ingersoll, who attended the sessions of the Court from Philadelphia, about this period wrote in his diary: "It seems to me that the dinner-giving system has increased very much since I first knew this great watering place — will *you* let me call it — where amusement is a business, a need, to which almost everybody is given up from 5 o'clock till bedtime. All the Secretaries give dinners and balls frequently, I fancy weekly, and many other persons, who, I should think, can ill afford it. The Court and Bar dine today with the President. In my opinion, a Judge should never dine out in term time except Saturday and Sunday, if then. In England, I am told, they hardly ever do, and I fancy the pillars of Westminster Hall would marvel much if they could see the Supreme Court of the United States begin a day's session, aye, after robing and taking their places, by receiving from the Marshal their cards of invitation and taking up their pens to answer them before the list of cases is called for hearing." [2] As the

[1] *J. Q. Adams*, entry of March 8, 1821.

[2] *Life of Charles Jared Ingersoll* (1897), 123, by William M. Meigs, Feb. 14, 1823. Other entries at this time are interesting:

"*Feb. 5, 1823.* The Drawing room this Evening neither so crowded, nor, I think, so pleasant as I have known such assemblies formerly. Mr. Adams, Mr. Calhoun and Mr. Thompson were there, not Mr. Crawford, — all the Judges except Washington and Todd, the latter delayed at home in a fall, said to be serious — Mr. Clay in fine spirits. I understand that he talks unreservedly of his prospects of the Presidency, and says that he is confident of success. . . .

"*Feb. 20.* At Secretary Thompson's . . . we had the Chief Justice of the United States on one seat of honor and the Mexican Minister or Secretary of Legation, I did not ascertain which, on another, and Judges Johnson and Story. Fie on them for dining out so continually, tho how can they help under this raging star."

George Ticknor writing, Jan. 16, 1825, said: "The regular inhabitants of the city from the President downwards, lead a hard and troublesome life. It is their business to entertain strangers, and they do it, each one according to his means, but all in a very laborious way. . . . The President gives a dinner once a week to thirty or forty people — no ladies present — in a vast cold hall. . . . I was, however, at a very pleasant dinner of only a dozen, that he gave to Lafayette, when the old gentleman made himself very agreeable, but this was out of the common course. . . .

Judges lived for the most part in the same lodgings their intercourse was necessarily of the closest kind, off as well as on the bench, and Judge Story, writing, March 8, 1812, said that: "It is certainly true, that Judges here live with perfect harmony, and as agreeably as absence from friends and from families could make our residence. Our intercourse is perfectly familiar and unconstrained, and our social hours, when undisturbed with the labors of law, are passed in gay and frank conversation, which at once enlivens and instructs. Abroad, our rank claims and obtains the public respect; and scarcely a day passes in Court, in which parties of ladies do not occasionally come in and hear, for a while, the arguments of learned counsel. On two occasions, our room has been crowded with ladies to hear Mr. Pinkney, the present Attorney-General." [1]

Mr. Adams (the Secretary of State) gives a great dinner once a week, and Mrs. Adams a great ball once a fortnight. . . . Calhoun's, however, was the pleasantest of the ministerial dinners, because he invited ladies, and is the most agreeable person in conversation at Washington — I mean of the Cabinet. . . . The truth is, that at Washington society is the business of life. . . . People have nothing but one another to amuse themselves with; and as it is thus obviously for every man's interest to be agreeable, you may be sure very few fail." *Ticknor*, I, 349.

[1] The mention in this letter of the presence of ladies in the Court-room recalls the fact that their attendance was very common at that date, and influenced the argument of counsel — particularly of Pinkney. An amusing example was given by William Wirt in a letter to F. W. Gilmer, April 1, 1816, regarding the argument of *Jones et al.* v. *Shore's Ex'ors*, 1 Wheat. 462, in which he spoke of Pinkney: "At the Bar, he is despotic, and cares as little for his colleagues or adversaries as if they were men of wood. . . . In the cause in which we were engaged against each other, there never was a case more hopeless of eloquence since the world began. It was a mere question between the representatives of a dead collector and a living one, as to the distribution of the penalty of an embargo bond — whether the representatives of the deceased collector, who had performed all the duties and recovered the judgment, or the living collector, who came in about the time the money was paid by the defendant into Court, and had, therefore, done none of the duties, was entitled to the award. I was for the representatives of the deceased collector — Pinkney for the living one. You perceive that his client was a mere harpy who had no merits to plead. There were ladies present — and Pinkney was expected to be eloquent at all events. So the mode he adopted was to get into his tragical tone, in discussing the construction of an Act of Congress. Closing his speech in this solemn tone, he took his seat, saying to me, with a smile, 'that will do for the ladies.'" *Wirt*, I, 404; *Marshall*, IV, 133, 134, 140.

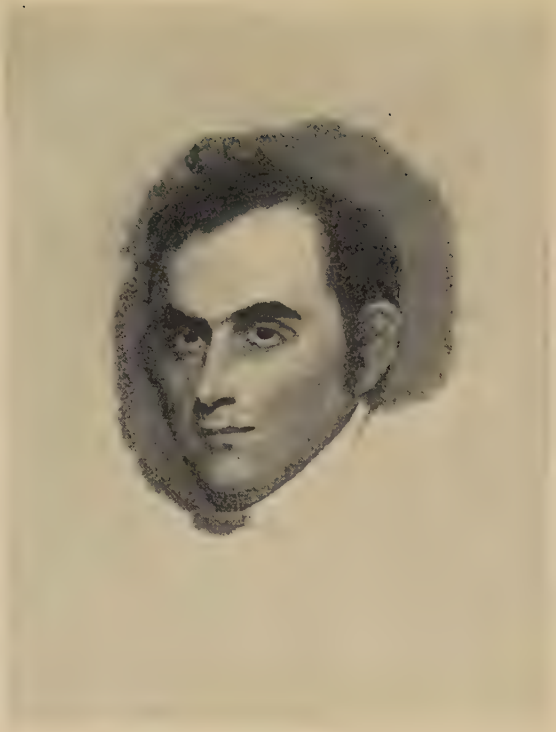
CHAPTER ELEVEN

CORPORATE CHARTERS AND BANKRUPTCY

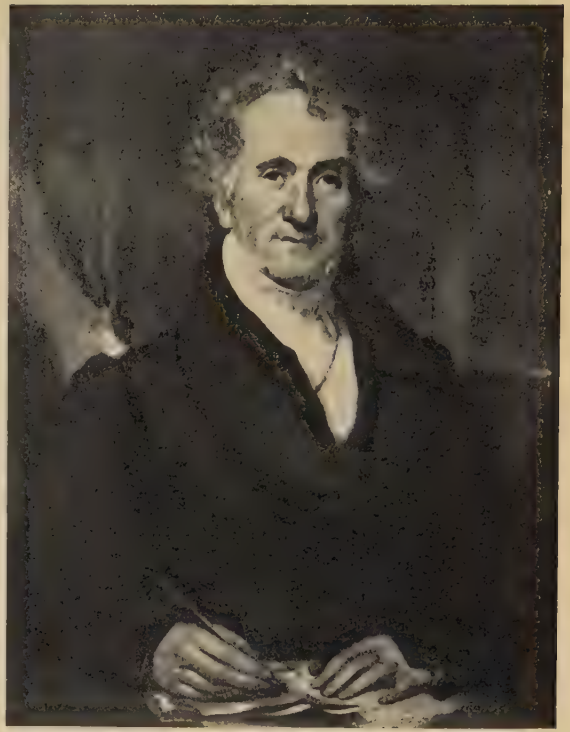
1817–1819

A NEW epoch in its history began with the first year of President Monroe's Administration; and as this was known in politics as "the Era of Good Feeling", so it might be termed in judicial annals "The Era of Calm", preceding a storm of controversy which was about to rage around the Court for the next thirteen years. The 1817 Term was chiefly devoted to the argument of prize and other cases arising out of the War of 1812, and no decisions of permanent significance were rendered.[1] The 1818 Term, however, was notable for the decision of one case and the argument of another which marked the Court's importance as a factor in American history. In the first of these cases, *Gelston* v. *Hoyt*, 3 Wheat. 246, there was strikingly reaffirmed the cardinal principle of the Anglo-Saxon system of law that no man — not even the President of the United States — is above the law. The question involved was whether certain Government officials, who had been sued for damages for making seizure of a vessel under alleged authority of the neutrality laws, could justify their act by alleging that it was

[1] At this 1817, Term, an interesting custom among the members of the Bar appears from the following item in the *National Intelligencer*, Feb. 6, 1817. At a meeting of the members of the Bar presided over by Robert Goodloe Harper and with Walter Jones as Secretary, the Attorney-General presented resolutions on the death of Samuel Dexter of Massachusetts and Alexander J. Dallas of Pennsylvania, and it was resolved that the members of the Bar "will wear crape on the left arm during the present Term, as a mark of respect for the illustrious talents of the deceased in professional and their eminent virtues in private life."



DANIEL WEBSTER IN 1825



WILLIAM WIRT

done by express order of President Madison. Attorney-General Rush argued in their behalf that it has been "the wise policy of the law, by enactments and decisions co-extensive with the range of public office, to throw its shield over officers while acting under fair and honest convictions." But as Ogden Hoffman and David B. Ogden, counsel for the plaintiff, pointed out, unless the act could be justified under some express authority, it was illegal, and "were it otherwise, the President would be a despot." The Court, through Judge Story, held that as no statute authorized the President to direct seizure by the civil officers, his order constituted no protection to them, if rights of an individual had been trespassed upon. Thus, for a third time and with regard to the instructions of three different Presidents (Adams, Jefferson and Madison), the Court in its short career had shown its independence of the Executive, and its determination to prove to all that "the Constitution is a law for rulers and for people, equally in war and in peace, and covers with its shield of protection all classes of men at all times and under all circumstances." [1]

The other case which made this Term one of the most noted in the Court's history was *Dartmouth College* v. *Woodward*, 4 Wheat. 518. No lawsuit has since been more fully or graphically described; yet at the time of its argument, it attracted very little attention or interest from the legal profession or from the general public. And it is clear that no one anticipated that a decision upon the question, whether the State Legislature of New Hampshire had the power

[1] "To the end that this shall be a government of laws and not of men", were the words of that clause of the Massachusetts Constitution of 1780 which distributed the powers of government. "The government of the United States has been emphatically termed a government of laws and not of men", Marshall had said in *Marbury* v. *Madison*.

to amend in substantial particulars a corporate charter granted to trustees of a College, would affect the future economic development of the country. In the State Court, the Legislative power to divest vested rights had been attacked on common law grounds; but now in the Supreme Court of the United States, since the case came up on writ of error to the State Court and not from the Federal Circuit Court, the appellants were confined to a consideration of the constitutional question alone, whether the State law was an impairment of the obligation of a contract. Though the Court had already decided four cases under this clause of the Federal Constitution, it had as yet never determined whether a corporate charter was a contract.[1] Thus a new point of constitutional law was to be presented in the case, and one destined to become "so imbedded in the jurisprudence of the United States as to make (it) to all intents and purposes a part of the Constitution itself." [2] The argument in this noted case began at eleven o'clock in the morning on March 10, 1818. The adherents of the old charter, whose rights it was claimed had been impaired, had retained Daniel Webster of Massachusetts, then thirty-six years old, who had been a Member of Congress for the

[1] *Fletcher* v. *Peck* (1810), 6 Cranch, 87; *New Jersey* v. *Wilson* (1812), 7 Cranch, 164; *Terrett* v. *Taylor* (1815), 9 Cranch, 43; *Town of Pawlet* v. *Clark* (1815), 9 Cranch, 292. Judge Swayne said, in *Edwards* v. *Kearzey* (1878), 96 U. S. 595: "The point decided in *Dartmouth College* v. *Woodward* had not, it is believed, when the Constitution was adopted, occurred to any one. There is no trace of it in the *Federalist* or in any other contemporaneous publication. It was first made and judicially decided under the Constitution in that case. Its novelty was admitted by Chief Justice Marshall." It seems to have escaped the notice of legal historians that the point had been raised in New York as early as 1803, when (as stated in the newspapers of the day): "An Act has passed the Legislature of New York changing certain provisions of the Incorporation of the City of New York, extending right of suffrage for aldermen and members of the common council. Judge Kent, a member of the Council of Revision and a firm Federalist, has declared these alterations unconstitutional, and has attempted to establish the absolute inviolability of charters." *National Intelligencer*, March 31, 1803; *American Citizen* (N. Y.), April 5, 1803; *Republican Watchtower* (N. Y.), March 30, April 5, 1803.

[2] Waite, C. J., in *Stone* v. *Mississippi* (1880), 101 U. S. 814.

past five years and a practitioner before the Court for the past four years. With him was Joseph Hopkinson of Pennsylvania, then forty-eight years old, who had never argued a constitutional case before the Court. For the other side, there appeared William Wirt, forty-six years of age, Attorney-General of the United States, and a lawyer of immense practice; and John Holmes of Maine, a man of forty-five years of age, a Member of Congress, a lawyer of far less caliber than the others but of political skill.[1] The argument consumed but three days, Webster taking most of the first day; Holmes, the end of the first and the morning of the second; Wirt, the afternoon of the second and part of the morning of the third; and Hopkinson, the balance of the time. The audience, as Webster later said, was "small and unsympathetic." [2] Of the characteristics of his associates and opponents at the Bar, Webster gave a vivid portrayal in his correspondence during the progress of the argument and later.[3] Of Holmes, he wrote that "he gave us three hours of the merest stuff that ever was uttered in a county Court," and again: "Holmes did not make a figure. I had a malicious joy in seeing Bell (Holmes' client), sit by to hear him, while everybody was grinning at the folly he uttered. Bell could not stand it. He seized his hat and went off." "Thus far there is

[1] For description of the cases previously argued by these counsel, see *Historical Note on the Dartmouth College Case*, by Charles Warren, *Amer. Law Rev.* (1912), XLVI.

[2] *Congressional Reminiscences* (1882), by John Wentworth, 42–46. See also statement of Chauncey Goodrich that the audience was "small, consisting chiefly of legal men." *Works of Rufus Choate* (1862), I, 515. On the other hand, another auditor, George Ticknor, wrote that: "The Court-room was excessively crowded, not only with a large assemblage of the eminent lawyers of the Union, but with many of its leading statesmen." *Amer. Quart. Rev.* (1831), XVIII.

[3] *Private Correspondence of Daniel Webster* (1857), I, letters to William Sullivan, Feb. 17, 1818, to Jeremiah Mason, Feb. 22, 1818; *Writings and Speeches of Daniel Webster* (1903), XVI. And see for a general description of this case, *The Dartmouth College Causes and the Supreme Court of the United States* (1879), by John M. Shirley; *Daniel Webster* (1883), by Henry Cabot Lodge; *Marshall*, IV,

nothing new or formidable developed. (All stuff.)" Of Wirt, he wrote on March 11: "Mr. Wirt is to follow Mr. Holmes. He is a man of talents and will no doubt make the best of his case. Mr. Hopkinson is to reply and will make up for all my deficiencies, which were numerous. I am very much inclined to think the Court will not give a judgment this Term. All I shall at present add is that, from present appearances, I have an increased confidence that, in the end, justice will be done in this cause. Mr. Hopkinson has entered into this case with great zeal and will do all that man can do." At the close of Wirt's argument, he wrote again: "He is a good deal of lawyer, and has very quick perceptions and handsome power of argument, but he seemed to treat this case as if his side could furnish nothing but declamation. . . . He made an apology for himself that he had not had time to study the case, and had hardly thought of it till it was called on"; and again: "Wirt has talents, is a competent lawyer and argues a good cause well. In this case, he said more non-sensical things than became him." "Mr. Wirt said all that the case admitted." [1] Of his colleague, Hopkinson, Webster wrote: "Mr. Hopkinson made a most satisfactory reply, keeping to the law and not following Holmes and Wirt into the field of declamation and fine speaking." "Mr. Hop-

[1] Writing, however, to Wirt a month later, April 5, 1818, Webster gave him more praise than he did in the letters, above quoted, to Mason, Smith and Brown; for he wrote to Wirt, contradicting a report that he had disparaged Wirt's argument, that: "It is the universal opinion in this quarter . . . that that argument was a full, able, and most eloquent exposition of the rights of the defendant. I must leave it to you to infer whether this general sentiment is in concurrence with my own uniform declarations on the subject. . . . In my opinion, no further discussion of questions involved in the cause, either at the Bar or on the Bench, will bring forth on the part of the defendant, any important idea which was not argued, expanded and pressed in the argument. . . . I hope also you will think me not quite weak enough to depreciate the power of an adversary. If conquered, this would but increase the mortification of defeat. If conquering, it would take away the glory of victory. In victory or defeat, none but a fool could boast that he was warring, not with giants, but with pigmies."

kinson understood every part of our cause and in his argument did it great justice." The opinions of other auditors at the argument coincided with Webster's characterizations. "Holmes went up like a rocket and came down like a stick. The opinion was universal that Webster rose superior even to Wirt (though it is said that he appeared very well) and infinitely so to Holmes," wrote David Daggett, a Senator from Connecticut. "Webster shone like the sun and Holmes like a sunfish," wrote another. "Webster acquitted himself with the highest credit and produced the strongest sentiments of respect and admiration. Mr. Holmes fell below mediocrity," wrote Rufus King.[1]

Of Webster's own argument and its famous pathetic peroration, the contemporaneous descriptions are so widely known as to make their repetition unnecessary.[2] Webster himself took a very modest view of its merits and attributed its value largely (and with some justice) to the remarkably able arguments made in the State Court by his associates, Jeremiah Mason and Jeremiah Smith. "I have told you very often," he wrote to Mason, "that you and Judge Smith argued it very greatly. If it was well argued at Washington, it is proof that I was right, because all that I said at Washington was but those two arguments clumsily put together by me." But if it was the learning and sagacity of his associates which served as the framework, it was the power of statement and vivid eloquence of Webster himself which completed the massive

[1] *Mason*, letter of Daggett to Mason, March 18, 1818; *King*, II, letter of King to Christopher Gore, May 5, 1818.

[2] See description by Chauncey Goodrich in *Works of Rufus Choate* (1862), I; *Life of Daniel Webster* (1870), by George Ticknor Curtis, I; *Remarks on the Life and Writings of Daniel Webster*, by George Ticknor, *Amer. Quart. Rev.* (1831), XVIII; *Daniel Webster — The Expounder of the Constitution* (1905), by Everett P. Wheeler containing the first reproduction of a MSS description of Webster's argument by Judge Story, discovered in the Library of Congress.

structure; and it established forever his reputation as a great jurist. When the arguments were ended, however, in spite of the fact that, as Webster wrote, "nearly or quite all the Bar here are decidedly with us in opinion," the Court was not in agreement as to its decision. In answer to a question put by Holmes, it was forced to say that "it would pay to the subject the consideration due to an act of the Legislature of a State and a decision of a State Court, and that it was hardly probable a judgment would be pronounced at this Term"; and on March 13, as stated in the *National Intelligencer*, "the Chief Justice observed that the Judges had conferred on the cause. Some of the Judges have not come to an opinion on the case. Those of the Judges who have formed opinions do not agree. The cause must therefore be continued until the next Term." On March 14, 1818, the Court adjourned "after a laborious session."[1] Webster, writing on the same day, expressed his views as to the outcome: "I have no accurate knowledge of the manner in which the Judges are divided. The Chief Justice and Washington, I have no doubt are with us. Duval and Todd, perhaps against us; the other three, holding up. I cannot much doubt but that Story will be with us in the end, and I think we have much more than an even chance for one of the others. I think we shall finally succeed."

Before the opening of the next Term, Wirt's clients had determined to retain William Pinkney of Baltimore and to ask the Court for a reargument.[2] Judge

[1] *Niles Register*, XIV, March 21, 1818.

[2] *Private Correspondence of Daniel Webster* (1857), I, letter of Hopkinson, Nov. 17, 1818. Hopkinson wrote as to Pinkney: "I suppose he expects to do something very extraordinary in it, as he says, 'Mr. Wirt was not strong enough for it, has not back enough.' There is a wonderful degree of harmony and mutual respect among our opponents." Judge Story wrote to Henry Wheaton, Dec. 9, 1818, deploring Pinkney's disagreement with Wirt: "The world is wide enough for all

Story evidently believed that the case would be reargued, for he wrote, December 9, 1818: "The next Term of the Supreme Court will probably be the most interesting ever known. Several great constitutional questions, the constitutionality of the insolvent laws, of taxing the Bank of the United States, and of the Dartmouth College new charter, will probably be splendidly argued. Mr. Pinkney is engaged in these." On the other hand, Webster appears to have had confidence to the contrary; for he wrote to Mason on the first day of the new Term of Court, February 1, 1819: "Wirt and Pinkney still talk of arguing one of the College causes. On our side we smile at this, not being able to suppose them serious. I hope they will not attempt it, as it would only lead to embarrassment about the facts. I should have no fears for the result." On the same day, he wrote to Timothy Farrar in a more worried tone: "The Court met today, present all but Todd. Mr. Pinkney will be in town today, and I suppose will move for a new argument in the case *vs.* Woodward. It is not probable, perhaps, that he will succeed in that object, altho I do not think it by any means certain. Not a word has as yet fallen from any Judge on the cause. They keep their own counsel. All that I have seen, however, looks rather favorable. I hope to be relieved of further anxiety by a decision for or against us, in five or six days. I'd not have another such cause for the College plain and all its appurtenances."

In the newspapers of the day, little attention was paid to the argument of this noted case, except by the

the learning and genius, public virtue and ambition of all the wise and good, and it is a great mistake for a great man to indulge in an arrogant pride or a morbid jealousy in respect to his competitors or rivals. . . . All acknowledge his talents and his learning. He will gain by returning the acknowledgment in a just deference to the talents of others." *Story*, I, 312.

local press of New Hampshire and Massachusetts.[1] A Washington correspondent of the *Columbian Centinel* in Boston wrote that it had been argued "before a very respectable and highly qualified audience of both sexes. . . . Our friend Webster never made a happier effort. To a most elaborate and lucid argument he united a dignified and pathetic peroration which charmed and melted his hearers. Mr. Hopkinson was also as usual very strong and very eloquent in his conclusion." And a correspondent of another Boston paper wrote: "Mr. Webster opened the cause in that clear, perspicuous, forcible and impressive manner for which he is so much distinguished; and for two or three hours enchained the Court and the audience with an argument which, for weight of authority, force of reasoning and power of eloquence, has seldom been equalled in this or any Court. Mr. Holmes opened the cause on the part of the University, and was followed by the Attorney-General, Mr. Wirt, in a very able and eloquent argument on the same side. Mr. Wirt's style is splendid, his manner vehement, and his action attended with much effort. Before he concluded he became so exhausted by his great efforts of voice and action, that he was obliged to request the Court to indulge him until the next day, expressing at the same time his regret 'that he had not profitted of the example of extreme coolness, which had been set by the counsel associated with him.' Mr. Hopkinson closed the cause for the College with great ability, and in a manner which gave perfect satisfaction and delight to all who heard him. The cause stands continued for advisement. . . . In the meantime, there is no reason, I apprehend, for the

[1] *Columbian Centinel*, March 24, 1818; *Boston Daily Advertiser*, March 23, 1818.

friends of the College to be disheartened or to relax in their efforts." [1]

The Court met for the 1819 Term, for the first time "in the splendid room provided for it in the Capitol" (the room, now the Supreme Court Library, in which it sat until 1860).[2] And at its first session, February 2, the decision in the case was announced. As described by Webster in a jubilant letter to Mason: "As soon as the Judges had taken their seats, the Chief Justice said that in vacation the Judges had formed opinions in the College cause. He then immediately began reading his opinion, and, of course, nothing was said of a second argument. Five of the Judges concurred in the result, and I believe most, or all of them, will give their opinion to the Reporter. Nothing has been said in Court about the other causes. Mr. Pinkney says he means to argue one of them; but I think he will alter his mind. There is nothing left to argue on. The Chief Justice's opinion was in his own peculiar way. He reasoned along from step to step; and not referring to the cases, adopted the principle of them, and worked the whole into a close, connected and very able argument. Some of the other Judges, I am told, have drawn opinions with more reference to authorities." [3]

The judgment of the Court was a complete victory

[1] It is interesting to note the comment in the above letter on Wirt's and Holmes' arguments; as it confirms the general impression that they were quite overmatched by the counsel on the other side, and also that there was not a perfect concord between the two associates. The *New Hampshire Gazette*, a year later, also admitted that the University's side of the case had not been sufficiently prepared, saying that the counsel "were men overwhelmed with other business, unable to give this case proper attention, and consequently unprepared to meet those who came forward under every advantage." See *Boston Daily Advertiser*, Feb. 25, 1819.

[2] See *Niles Register*, Feb. 20, 1819; see also *National Intelligencer*, Feb. 2, 1819.

[3] The *National Intelligencer*, in its issue of Feb. 6, 1819, giving a statement of the decision, began for the first time publication of a daily announcement of the cases argued and decided in the Court.

for Webster's client. The Court held, for the first time, that a private corporate charter was a contract within the meaning of the clause of the Constitution forbidding impairment of the obligation of contract; that the College involved in this case was a private corporation; and that the legislation of New Hampshire amending its charter was invalid. Thus was established one of the fundamental principles of American law. But another phase of the decision was of importance in demonstrating the freedom of the Court from political bias. For the case had involved, not a mere abstract point of law, but a political issue, on which there had already begun to be divisions on party lines throughout the country. The old College Trustees were largely Federalist in politics and were supported by the Federalist interests in New Hampshire. The new charter, the validity of which had been called in question, was the work of a College faction composed largely of stanch Republicans. Their leader, Governor William Plumer, had broached the subject of a change in the charter in his first message to the Legislature, stating that many of its provisions "emanated from royalty and contained principles . . . hostile to the spirit and genius of free government", with which a Legislature had power to interfere. Jefferson himself had written to Plumer that this message was replete with sound principles and truly Republican: "The idea that institutions established for the use of the Nation cannot be touched nor modified, even to make them answer their end, because of rights gratuitously supposed in those employed to manage them in trust for the public, may, perhaps, be a salutary provision against the abuses of a monarch, but it is most absurd against the Nation itself. Yet our lawyers and priests

generally inculcate this doctrine." [1] This letter marked the lines on which the political parties had begun to differ. The Federalists, in general, laid stress on the rights of property created by legislation and their inviolability as against subsequent legislative control, and they sought to protect vested rights against fluctuating public sentiment and the rapidly changing political condition of the times. "The people ought to be made to know that, in certain cases, their rights are above the reach of the Legislature, and thus popularity may be given to a denial of Legislative power," wrote Isaac Parker, the strong Federalist Chief Justice of Massachusetts. The Republicans, on the other hand, looked with suspicion on a doctrine which restrained the people from resuming control of franchises which the people themselves had created and granted. Webster had paid attention in his argument to this difference of political theory, as affecting the doctrine of law to be established in this case, and had pointed out the danger of attacks upon property rights resulting from changes in party control of Legislatures. To guard against this, he said, the Federal Convention of 1787 "very properly . . . added this constitutional bulwark in favor of personal security and private rights", and this action, he said, faithfully represented the genuine sentiments and undoubted interests of the public. "The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes and Legislative interferences in cases affecting personal rights become jobs in the hands of enterprising and influential specu-

[1] See *The Dartmouth College Causes and the Supreme Court of the United States* (1879), by John M. Shirley, letter of Jefferson to Plumer, July 21, 1816, letter of Parker to Webster, April 28, 1819.

lators, and snares to the more industrious and less informed part of the community." Unless the inviolability of charters shall be upheld, he said, "Colleges will become a theatre for the contention of politics. Party and faction will be cherished in the places consecrated to piety and learning. These consequences are neither remote nor possible only. They are certain and immediate. . . . It will be a most dangerous experiment to hold these institutions subject to the rise and fall of popular parties and the fluctuations of political opinions." That Marshall had anticipated political opposition to the Court's decision was shown in the opening words of his opinion. "The Court can be insensible neither to the magnitude nor delicacy of this question," he said, but "on the Judges of this Court is imposed the high and solemn duty of protecting, from even Legislative violation, those contracts which the Constitution of our country has placed beyond Legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink." And that Judge Story was also impressed with the delicacy of the Court's position in setting aside a State law, and that he evidently anticipated that the judgment of the Court was certain to be the object of popular attack, was seen from the closing words of his own opinion: "The predicament in which this Court stands in relation to the Nation at large is full of perplexities and embarrassments. . . . It stands . . . in the midst of jealousies and rivalries of conflicting parties, with the most momentous interests confided to its care. Under such circumstances, it never can have a motive to do more than its duty; and, I trust, it will always be found to possess firmness enough to do that. . . . It is not for Judges to listen to the voice

of persuasive eloquence or popular appeal. We have nothing to do but to pronounce the law as we find it; and having done this, our justification must be left to the impartial judgment of our country."

Such being the conditions under which the case was argued, it was highly important that public confidence in the Court should not be weakened by a decision based on party lines. Fortunately, in this case, as in so many others, the Court showed its high independence; and its judgment was concurred in by five Judges, two of whom were Federalists — Marshall and Washington — and three Republicans — Johnson, Livingston and Story; Duval, a Republican, alone dissented; and Todd, the other Republican, was absent. That a Republican Court should establish "principles broad and deep, and which secure corporations . . . from legislative despotism and party violence for the future", as Hopkinson wrote,[1] and should form a "defence of vested rights against State Courts and Sovereignties", as Webster said, was a fact of significant import in the history of the enforcement of the provisions of the Constitution relative to the powers of the States.[2]

In view of the immense effect of this case upon the future jurisprudence and the future development of corporate interests in this country, it is of interest to note that, at the time of its decision, its importance was not at all realized.[3] Notwithstanding the fact that in the Federalist quarterly, the *North American Re-*

[1] See letter of Joseph Hopkinson to President Brown, Feb. 2, 1819.

[2] Webster, as quoted in *Congressional Reminiscences* (1882), by John Wentworth.

[3] The following statement in *The Judicial Veto* (1914), by Horace A. Davis, 15, is an interesting example of history written *ex cathedra* and not after examination of contemporaneous papers: "*That decision* (the *Dartmouth College Case*) *came as a thunderbolt to the whole country* which had been proceeding on the true theory that the States had the same right to alter, amend or repeal a franchise that they had to grant it." *North Amer. Rev.* (Jan., 1820), VIII.

view, it was said, a few years later, that "perhaps no judicial proceeding in this country ever involved more important consequences or excited a deeper interest in the public mind", it is certain that, for the public at large, the decision had little immediate significance. Slight notice was taken of it in the public press; and in *Niles Register*, the weekly periodical published in Baltimore, which usually printed a fairly complete summary of all the political and legal occurrences of the times, there was no mention whatever of the case, although regarding two other famous decisions made at the same Term of Court, — *Sturges* v. *Crowninshield* and *McCulloch* v. *Maryland* — full news-accounts and editorial comments appeared in its columns. The principal New York newspapers contained very slight mention of the decision.[1] The Federalist papers of Boston paid somewhat more attention. The *Columbian Centinel's* Washington correspondent wrote of "the most able and elaborate opinion which, perhaps, has ever been pronounced in a Court of Judicature, on the far-famed question relative to Dartmouth College. It can scarcely be necessary to add for the information of the enlightened part of the community, and especially of those who were able to comprehend the skeleton of the gigantic argument of the Hon. Mr. Webster of your place, that the decision is in favour of the College or ancient Institution. The opinion of the Court goes the whole length with the plaintiffs, overthrows every ground of defence relied on by the defendants." Another letter in the same paper said: "This question has excited a deep and lively interest in the public mind

[1] See *New York Evening Post*, Feb. 5, 1819; terming the opinion "a most able and elaborate production"; see also *New York Gazette*, Feb. 6, 1819; *New York Commercial Advertiser*, Feb. 6, 1819, the latter simply saying: "We understand that the opinion of Court as delivered by the Chief Justice is a learned and able paper."

in different parts of the country, and at different times seems to have aroused the religious and political feelings of the people. But we feel assured, from the very dispassionate manner in which it has been conducted of late, from the very thorough examination which it has undergone by some of the ablest lawyers in our country, and from the unanimity that exists among the Judges of the Court upon the question that it is settled strictly upon pure principles of law." The *Centinel* printed an editorial to the effect that "the great question is settled in a manner which must give the utmost satisfaction to every friend of science and learning in the United States." The *Boston Daily Advertiser* printed a letter from its Washington correspondent describing the opinion and saying: "It is one of the most elaborate and able opinions I have ever heard. It was drawn up by the Chief Justice, and bears marks of a great and vigorous mind, exercising all its powers in search of truth, and in support of a great constitutional principle. . . . Upon this result I most sincerely congratulate the good people of New England. It is calculated to ensure permanency to those numerous valuable institutions, so honourable to them, against the fluctuation of party and the rude attacks of rash innovators." The Republican papers in Boston contained only a few lines regarding the case.[1] The newspapers of New Hampshire were divided on political lines in their attitude towards the decision, the Republican papers generally opposing it, and the *New Hampshire Gazette*, one of the leading papers, even going so far as to intimate that the case was not properly tried, and saying: "Had the case been fairly laid before the Court, no

[1] *Columbian Centinel*, Feb. 10, 1819; *Boston Daily Advertiser*, Feb. 8, 1819; *Boston Patriot*, Feb. 9, 1819; *Independent Chronicle*, Feb. 8, 1819.

man, without impeaching their integrity or their common sense, can doubt but their decision would have confirmed that of the Superior Court in this State." Federalist papers, like the *Portsmouth Oracle*, however, supported the decision with vigor. In the South and West, practically no attention was paid to the decision at the time it was rendered, by the newspapers, though a leading Republican paper of Kentucky said: "We hope our Legislature will not hereafter grant any charter whatever, without reserving the right to alter, amend or repeal as the public interest may require." [1]

But while the import of the case was not at once perceived by the Bar and the general public, Judge Story, with deeper vision, foresaw, as he wrote to Chancellor Kent, "the vital importance, to the well-being of society and the security of private rights, of the principles on which that decision rested." "Unless I am very much mistaken," he wrote, "these principles will be found to apply, with an extensive reach, to all the great concerns of the people, and will check any undue encroachments upon civil rights, which the passions or the popular doctrines of the day may stimulate our State Legislatures to adopt." [2] No other public man, however, seemed then to comprehend the fact that this clause of the Constitution which forbade a State to impair the obligation of contracts

[1] *Argus of Western America*, Feb. 26, 1819. Two years later, however, the *Washington Federalist* (then a Republican paper) said, March 12, 1821: "Whilst perusing the strange arguments of the Supreme Court in the case of Dartmouth College, we involuntarily thanked our stars that the Revolution had been effected before the birth of this august tribunal, else error had been canonized and frailty or incongruity made perpetual, under color of enforcing contracts and immortalizing an useless charter. In all this we only see human nature, as it has always been seen, prone to assume power by all the ingenuity it can exercise. Consequently, we have not the most distant idea, nor had we ever any intention, of ascribing corrupt motives to the Supreme Court. But the effect of error is often worse than that of crime itself."

[2] *Story*, I, 330, letter to Kent, Aug. 21, 1819.

would, for the next fifty years, have the most profound effect, and would produce the most litigation of any portion of that instrument; or that, as Sir Henry Maine has said, it would prove to be "the bulwark of American individualism against democratic impatience and socialistic fantasy." [1]

Unquestionably, the decision came at a peculiarly opportune period; for business corporations were for the first time becoming a factor in the commerce of the country, and railroad and insurance corporations were, within the next fifteen years, about to become a prominent field for capital. The assurance to investors that rights granted by State Legislatures were henceforth to be secure against popular or partisan vacillation, and capricious, political or fraudulent change of legislative policy, greatly encouraged the development of corporate business.[2] While, however, the doctrine of this case gave protection and security to the holder of corporate stock, and thus acted as a powerful factor in the development of the country by investors, it resulted frequently in a serious impairment of the rights of the public; and though it prevented a corrupt, radical or partisan Legislature from repealing acts of a former honest and wise predecessor, it equally prevented an honest and wise

[1] *Popular Government* (1885), by Sir Henry Maine, 247–248.

[2] The first corporation chartered in the United States after the Revolution was only thirty-nine years before 1819, the Bank of North America in 1780, in Pennsylvania. Prior to 1800, there had been only eight manufacturing corporations chartered in the whole country, and these in five States: in Massachusetts three; in New York, two; and in Connecticut, Kentucky and New Jersey, each one. Up to 1800, there had been only 213 corporations of all kinds, including banks, bridges, turnpikes, aqueducts and canals. Turnpike, canal and banking companies constituted the chief corporations in existence; and banks had started up in great numbers only since the expiration of the charter of the first United States Bank in 1811. It was only since the close of the War in 1815, and the passage of the Tariff Act of 1816, that manufacturing corporations had begun to develop to any extent, and these corporations were almost wholly chartered by special acts, New York alone having enacted (in 1811) a general business corporation statute.

Legislature from repealing the act of a former corrupt or unwise predecessor.[1] Two important modifications, however, made later by judicial interpretation, relieved the public from the rigid bonds originally placed upon its future action; the first of these relaxations being, that no charter should be construed to grant rights against the public by implication; the second, that no Legislature could defeat the right of a subsequent Legislature to alter or repeal a corporate charter, when such action was necessary under the police power of the State. It was nearly twenty years after the decision of the *Dartmouth College Case* before the first modification was made; and over fifty years, before the second. Many attempts have been made, beginning in 1854, to induce the Court to introduce a third modification, so as to restrict the right of a Legislature to bind its successors by a grant of tax exemption in a corporate charter; but the Court has never yielded on this point.

That so important a decision as the *Dartmouth College Case* aroused so little public interest at the time it was rendered was due largely to the fact that, within two weeks, another decision was handed down by the Court, which, though of less vital effect upon the constitutional history of the country, had an enormous influence upon the course of commercial conditions. This was the case of *Sturges* v. *Crowninshield*, 4 Wheat.

[1] *Status and Tendencies of the Dartmouth College Case*, by Alfred Russell, *Amer. Law Rev.* (1896), XXX; Cole, J., in *Dubuque* v. *Railroad*, 39 Iowa, 95, said: "The practical effect of the Dartmouth College decision is to exalt the rights of the few above those of the many. And it is doubtless true that under the authority of that decision, more monopolies have been created and perpetuated, and more wrongs and outrages upon the people effected, than by any other single instrumentality in the government." See also *Constitutional Limitations* (1868), by Thomas M. Cooley, 279–280 note; and for history of attempts by States to escape from the operation of the decision; see *The Limitations of the Power of a State Over a Reserved Right to Amend or Repeal Charters of Incorporation*, by Horace Stern, *Amer. Law Reg.* (1905), LIII; *Looker* v. *Maynard* (1900), 179 U. S. 46.

122, in which the constitutionality of State insolvent laws (and of the New York law in particular) was involved. The financial condition of the country at this time was exceedingly precarious. As Congress had enacted no National Bankruptcy Law, a decision of the Court holding that the States possessed no power over bankruptcy under the Constitution would be highly disastrous to commercial interests. Only five years before, Judge Washington sitting in the Circuit Court had held in 1814 that the exclusive power resided in Congress; while, on the other hand, Judge Johnson and Judge Livingston in the Circuit Courts in 1817 had held the contrary, the latter stating that "few questions have been agitated in any Court of the United States since the formation of the Federal Government of more consequence or of more delicacy." The State Courts had uniformly upheld the State laws.[1]

The very able arguments in the *Sturges Case* were made, just a week after the decision of the *Dartmouth College Case*, on February 8 and 9, 1819. "Certainly there never was a question discussed in a Court of Justice where the Court had the benefit of more laborious pleadings, evidently the result of laborious research," wrote a Washington correspondent.[2] Against the State laws, there appeared David Daggett of Connecticut, who opened "in a clear and perspicuous manner", and Joseph Hopkinson, who closed "with his usual acumen and ingenuity." On the other side were William Hunter of Rhode Island, who gave "a very learned view of the history of bankrupt laws and a subtle examination of the constitutional terms", and David B. Ogden of New York, whose "strong, logical

[1] *Golden* v. *Prince*, 3 Wash. C. C. 315; *Adams* v. *Storey*, 1 Paine, 79; *Farmers & Mechanics Bank* v. *Smith* (1817), *Hall's Amer. Law Journal*, VI; *Hannay* v. *Jacobs*, Circ. Ct. So. Car.; *Blanchard* v. *Russell* (1816), 17 Mass. 1.

[2] *New York Evening Post*, March 8, 1819.

powers, great learning would have saved the cause, if any ability could have saved it." The case was decided, February 17, eight days after the argument; and as Judge Johnson said later in *Ogden* v. *Saunders*, the Court "was greatly divided in their views of the doctrine, and the judgment partakes as much of a compromise as of a legal adjudication." The opinion, rendered by Marshall, confined itself to holding that the New York bankruptcy law in question was invalid as impairing the obligation of contract, in so far as it attempted to discharge a contract or debt entered into prior to the passage of the law. Owing to the somewhat indefinite phraseology of the opinion, a very general misunderstanding spread throughout the country; and it was understood both by business men and by the Bar that the Court had decided that the State had no power to pass any form of bankrupt or insolvent law. Many of the newspapers of the country published the statement that the Court had decided that a State might, by law, release the body of a debtor, but could not cancel or discharge the debt.[1] The decision, so construed, "took the States and the profession by surprise." [2] "This opinion has given much alarm to many persons; it is highly interesting to everyone," said *Niles Register*. "It will probably make some great revolutions in property, and raise up many from penury whose 'eyes have been blinded by the dirt of the coach wheels of those who ruined them', and cause others to descend to the condition that becomes honest men, by compelling a payment of their debts. The decision powerfully shows the necessity of a general bankrupt

[1] See for instance *New Brunswick* (N. J.) *Fredonian*, Feb. 25, 1819.

[2] Reverdy Johnson, arguing in *Cook* v. *Moffat*, 5 How. 345, in 1848; *Niles Register*, Feb. 27, 1819; *New York Evening Post*, Feb. 20, 23, 1819; *Baltimore Federal Republican*, cited in *Independent Chronicle* (Boston), March 6, 1819; *Columbian Centinel* (Boston), March 6, 1819; *Augusta Chronicle and Georgia Gazette*, March 31, 1819. See also *Connecticut Courant*, March 23, 1819.

law." A leading New York paper said that it "causes a very considerable sensation in the city and we do not wonder at it. . . . We advise to the suspension of all opinions until the decision itself reaches us." Later it said that the decision "has excited a very extensive alarm in the community. It is possible that the excitement now prevalent among the public may be more than commensurable to the cause. No tolerably accurate statement of the opinion of the Court has yet reached this city. The public impression is that discharges under the State laws have been declared void in all cases. . . . It is possible that the decision does not go to that extent. The only prudent course is to await the result in patience." A Baltimore paper said: "Nothing but the publication of the entire opinion can possibly allay the fermentation that is excited; all ministers of justice are on the alert; writs cannot be made out fast enough; attachments are crowding themselves into the secret and confidential transactions of everybody, and must be put a stop to in some way or other, or the hearts and arms of many of our best citizens will be paralyzed." A Boston paper said: "The late decision has created much excitement and alarm in many States. Persons, we learn, who have been discharged many years from contracts by the laws of their States, and have since acquired property, have had it attached to pay their old debts." A Georgia paper said that: "Much uneasiness has arisen in many parts of the country from this opinion. . . . Under the decision of the Supreme Tribunal of the country, what are wretched debtors to do? The States can exempt nothing but their bodies from the harassing pursuit of the law; the Congress, in making a bankrupt law, will include only the trading class in their act. There must, nevertheless, be power some-

where to free debtors from the load of obligations under which they may labor. If the power is not in the States, it must be in the United States . . . or does the Supreme Court mean by its opinion that neither the States nor Congress can free anything but the body of a mere insolvent, who is no trader, from liability to compulsory process? We hope the decision of the Court may not involve an inconsistency." Twelve days after the decision, a correct summary was finally published in New York on March 1, 1819, and it was then seen that the fears of the business community had been exaggerated, since the insolvent laws were only held invalid so far as they discharged prior existing debts. A calmer view of the situation was presented by a Washington correspondent, March 4, stating that while the decision was "no doubt to be lamented in regard to the temporary evils it must inflict, . . . certainly every intelligent and reflecting man must have anticipated the possibility of such a decision being ultimately pronounced by the highest tribunal of the country; and I know that many of the lawyers in it have confidently expected this would be the result. But whatever difference of opinion there may have existed on this subject, among professional men and among Judges, all will no doubt cheerfully acquiesce in a decision pronounced by the highest Court in the land, which is empowered to determine finally all questions arising under the Constitution of the United States which is the supreme law of the land." Another New York paper, however, said: "An extreme anxiety with regard to the effect of that decision has been excited not only here but in various other parts of the country. And it must be considered to be not a little extraordinary that, at the end of several weeks, the opinion of the Court has not been published. The truth is, no

decision has ever been made by that tribunal which came more immediately home to the business and feelings of the community, than such a one as this is supposed to be." [1]

The serious effect of the decision upon the business community was heightened by the fact that the country was passing through a period of financial disaster. The inflation by State bank currency and the land speculations in the South and West, the mismanagement and frauds in the Bank of the United States, the flooding of the markets with English goods after the close of the War of 1812, all had produced a general unsettlement of business, and many failures. Debtors in large numbers had taken advantage of State insolvent laws to obtain discharge of their debts. Now, the express decision in the *Sturges Case*, coupled with the uncertainty as to how far the Court might go in future cases, seemed to make manifest the imperative necessity for the passage of a National Bankruptcy Act. "The decision in the *Sturges Case* renders the passing of a National law imperious," said the *Baltimore Patriot*. "In every commercial community, such a law is necessary. The apathy that prevails in Congress on the subject is really surprising. How long will they shut their ears against the cries of distress? How long will they neglect supplication of thousands?" "Arguments and reasons sufficiently cogent were before advanced, but the highest legal tribunal of our country has added to these incentives, by its late determinations, a volume of arguments." [2] Since Congress, however,

[1] *New York Evening Post*, March 1, 8, 1819; *New York Daily Advertiser*, March 10, 1819; *Southern Patriot* (Charleston, S. C.), March 18, 1819.

[2] *Baltimore Patriot*, Feb. 24, March 13, 1819; *Niles Register*, Feb. 27, 1819. Daniel Webster, writing to Jeremiah Mason, Feb. 15, 1819, two days before the opinion was rendered in the *Sturges Case* had said: "Nothing has yet been done with the Bankruptcy (Bill) and it seems too late to do anything. The question is before the Court whether the State Bankruptcy Laws are valid. The general

failed to enact any bankruptcy legislation, and since the business world, as well as the Bar, was still left in doubt whether the Court would ultimately decide against the constitutionality of a State insolvent law applying to contracts made or debts incurred after its enactment, the whole country waited anxiously for some case to be brought before the Court which should involve that issue.

opinion is that the six Judges now here will be equally divided on the point. I confess, however, I have a strong suspicion there will be an opinion, and that that opinion will be against the State laws. If there were time remaining, the decision, should it happen, might help through the Bill. The question between Maryland and the Bank is to be argued this day week. I have no doubt of the result. Wirt and Pinkney still talk of arguing one of the College causes. On our side, we smile at this, not being able to suppose them serious. . . . I should have no fear of the result. I am anxious to know how the decision is received in New England. Our New Hampshire members behaved very well on the subject of the Judges' salaries, notwithstanding this decision. Mr. Swan made a speech, and, it is said, a very good one, in their favor. Holmes opposed them with great violence." *Webster*, XVI.

When the bankruptcy bill failed to pass the House of Representatives in 1822, the *New York Statesman* said, March 15, 1822: "Thus perishes the hopes of thousands of honest, industrious, enterprising and virtuous citizens, who have borne for years the deprivations and hardships of severe adversity."

CHAPTER TWELVE

THE BANK OF THE UNITED STATES

1819–1821

WITHIN three weeks after the decision in the *Dartmouth College Case* in 1819, and within five days after that in the *Sturges Case*, arguments were begun in the third great case of the Term, *McCulloch* v. *Maryland*. Only two weeks later, the opinion was rendered which was destined to become a fundament of American constitutional law, but which at the time of its delivery made the Court a storm center of criticism.

From the beginning of the framing of the Constitution, the line of cleavage of the political parties had been based on their divergence of view as to the limits of Federal as compared with State powers. At the outset of the Federal Convention, Edmund Randolph had submitted a resolution, which was agreed to by the Committee of the Whole, "that the National Legislature ought to be empowered to enjoy the Legislative rights vested in Congress by the Confederation, and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." Pinckney's draft advocated specific powers for Congress, and a general clause, "to make all laws for carrying the foregoing powers into execution." [1]

[1] *Documentary History of the Constitution* (1900), I, 262, 316. Alexander Hamilton's plan had been for a Legislature "with power to pass all laws which they shall judge necessary to the common defence and general welfare of the Union." *Ibid.*, I, 327, II, 783. Pelatiah Webster, in his *Dissertation* in 1783, had previously suggested that the powers of Congress "shall be restricted to such matters only

While the fears of the opponents of a consolidated form of government had been somewhat allayed by the adoption of the Constitution in its final form, specifically and expressly delegating the powers of Congress in definite terms, there still remained a grave anxiety over the indeterminate language contained in that clause which vested Congress with power "to make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof." [1] Though this clause had occasioned no debate in the Federal Convention,[2] it was received with much misgiving in the various State conventions, and predictions were rife that it would be used as a weapon against the sovereignty of the States. With the initiation of the new Government in 1789, the broad or narrow interpretation of this clause marked a line of division between schools of political thought and action; and it has been truly said that "the history of the United States is in a large measure a history of the arguments which sought to enlarge or restrict its import." [3] As early as 1791, those who feared lest the powers of the Federal Government should be expanded, at the expense of the States, by legislative practice or by judicial interpretation, saw their fears confirmed, when Congress, without any express power vested by the Constitution,

of general necessity and utility to all the States, as cannot come within the jurisdiction of any particular State, or to which the authority of any particular State is not competent, so that each particular State shall enjoy all sovereignty and supreme authority to all intents and purposes, excepting only those high authorities and powers by them delegated to Congress, for the purposes of the general Union. . . .

[1] *Constitution*, Article I, Section 8, paragraph 18.

[2] It was reported by Mr. Rutledge for the Committee of Detail, Aug. 6, adopted in Convention, Aug. 20, and reported in its final form by the Committee on Style and Arrangement, Sept. 12, 1787. See *Documentary History of the Constitution* (1900), III.

[3] *The American Commonwealth* (1888), by James Bryce, I, 370.

chartered a National bank. A few years later, their anxiety at the growth of Federal authority increased, when the Alien and Sedition Laws were upheld by the Courts under this "necessary and proper" clause. In 1800, a project to grant a Federal charter to a business corporation (though defeated) still further alarmed the strict constructionists; and Jefferson wrote to Edward Livingston: "The H. of R. sent us yesterday a bill for incorporating a company to work Roosevelt's copper mines in New Jersey. I do not know whether it is understood that the Legislature of Jersey was incompetent to this, or merely that we have concurrent legislation under the sweeping clause. Congress are authorized to defend the nation. Ships are necessary for defence; copper is necessary for ships; mines, necessary for copper; a company necessary to work the mines; and who can doubt this reasoning who has ever played at 'This is the House that Jack Built'? Under such a process of filiation of necessities the sweeping clause makes clean work." [1]

In 1805, the Court for the first time expressed its views of the nature of the interpretation to be given to the "necessary and proper" clause of the Constitution, when Marshall stated in *United States* v. *Fisher*, 2 Cranch, 358, that: "In construing this clause, it would be incorrect and would produce endless difficulties, if the opinion should be maintained, that no law was authorized which was not indispensably necessary to give effect to a specified power. . . . Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to

[1] *Jefferson*, IX, letter of April 30, 1800. See *Southern History Ass. Pub.* (1905), 104, letter of Hugh Williamson to McHenry, April 29, 1800, as to this project for the Government to finance a copper mine and to subscribe $50,000: "The bill is smothered in the North. Certainly, it is to be desired that companies were formed and copper mines were diligently wrought; but if Government ever become partners, they will infallibly be the milch cow."

the exercise of a power granted by the Constitution." As a result of the announcement of the Court's liberal doctrine of constitutional construction, an Amendment of the Constitution was urged in 1806 by a Virginia Congressman, to define laws "necessary and proper" as comprehending, "only such laws as shall have a rational connection with and immediate relation to the powers enumerated"; and his argument was based on the supposed fact that the Court had held that Congress had a right to make any law which it should determine to be expedient for carrying into execution the powers enumerated. "All these acts of Federal usurpation," he said, "while they are drawing into its vortex this great accession of power, are weaving around the State institutions the web of destruction." [1] In 1811, 1814 and 1816, the debates on the incorporation of the Bank of the United States developed the line of cleavage on this primary constitutional issue. "Little did the framers of the Constitution imagine," said the strict constructionists, "that there lay concealed under its provision a secret and sleeping power which could in a moment prostrate all their labors with the dust. . . . Let the principle of constructive or implied powers be once established, and you will have planted in the bosom of the Constitution a viper which, one day or another, will sting the liberties of this country to the heart." It is a "monstrous", "alarming" doctrine, converting us into "one entire consolidated Government of general, undefined powers." [2] The debates on the subject of internal improvements, during the years 1816 to 1818, also gave

[1] *9th Cong., 2d Sess.*, speech of Clopton in the House, Dec. 11, 1806; see also speech of Clopton on the Bank of the United States bill in the House, Dec. 23, 1814, *13th Cong., 2d Sess.*

[2] *11th Cong., 3d Sess.*, Jan. 18, 1811, speech of P. B. Porter of Connecticut; *14th Cong., 2d Sess.*, debate in the Senate, Feb. 26, 1817, on the bill for internal improvements, and later on President Madison's veto message of March 3, 1817.

rise to a discussion of constitutional doctrines, becoming more and more heated as time progressed.[1] The doctrine of implied powers, said the statesmen from the South, is "odious", "dangerous", "consolidative", "sweeping off some of the few remaining attributes of sovereignty from the States." On the other hand, those who upheld the maintenance of an adequately strong Federal Government joined with Henry Clay in eloquent defense and protest against "construing the Constitution as one would a bill of indictment . . . reducing it to an inanimate skeleton," its "atrophy" by "water gruel regimen."

It was at a time, therefore, when the contest between adherents of a broad and of a narrow construction had become a fixed phase of American politics, and had sharply divided the American people on party and sectional lines, that the Court, in 1819, was confronted with a case involving the question in its fullest scope. It was highly unfortunate that the decision of a point of constitutional law of so vital importance should have become necessary, in connection with a subject on which the American people were even more excitedly divided — namely the existence of the Bank of the United States. Had the legal question been presented in a case involving a topic less obnoxious than the Bank, unquestionably the doctrines which the Court enounced in *McCulloch* v. *Maryland* would have aroused far less antagonism. There was, in reality, nothing new in Marshall's opinion in that case, nothing which had not already been repeatedly said in Congressional debates, nothing, indeed, which Marshall had not already expressly stated in the *Fisher Case*, fourteen years before. But while little popular excitement had followed the judicial expression of Marshall's broad

[1] *15th Cong., 1st Sess.*, March 6–14, 1818.

constitutional views in 1805, since they were stated in a case presenting a topic of mild interest, their announcement now in 1819 was greeted with an outburst of indignation and even of actual defiance.[1] And this was due, not so much to the particular constitutional doctrines established, as to the fact that the decision gave life to a hated banking corporation. To grasp the effect of the decision upon contemporaneous history, the status of the Bank of the United States at that time must be borne in mind. When first chartered in 1791, it had been opposed by the Anti-Federalists of Maryland, Virginia and the Carolinas. At the expiration of its charter in 1811, in spite of its proven service to the Government and to the business public through times of severe financial stress, it had become an object of general odium, due partly to the fact that it was under almost complete control of the Federalists (who, it was believed, used it as a political machine), partly to the fact that its stock was largely held by British and other foreigners, and partly to the extreme jealousy of the State banks.[2] But in spite of these antagonistic

[1] "Parties in America, as in most countries, have followed their temporary interest; and if that interest happened to differ from some traditional party doctrine, they have explained the latter away. Whenever there has been a serious party conflict, it has been in reality a conflict over some living and practical issue, and only in form a debate upon canons of legal interpretation. . . . Men did not attack or defend a proposal because they held it legally unsound or sound on the true construction of the Constitution, but alleged it to be constitutionally wrong or right because they thought the welfare of the country, or at least their party interests, to be involved. Constitutional interpretation was a pretext, rather than a cause, a matter of form rather than of substance." *The American Commonwealth* (1888), by James Bryce, I, 379.

[2] Timothy Pickering, writing to Judge Richard Peters, Jan. 30, 1811, said: "You will not be surprised if I should trace this opposition to the Bank to the 'origin of our (political) evil' — the philosopher of Monticello. He and Randolph perplexed the President with their plausible objections, which, at the last moment, were overthrown by Hamilton. Jefferson has never forgotten the signal defeat. Envy and hatred of his rival have ever since rankled in his bosom; and if he can now destroy the Bank, he will feel the final victory to be his own. There are other motives to influence him in this case. Of American stockholders, the greater part by far are Federalists; and of foreigners, the chief are Englishmen." *Peters Papers MSS.* See also *The Second Bank of the United States* (1900), by Ralph C. H. Catterall; *Financial History of the United States* (1879), by Albert S. Bolles.

factors, the necessity for its reëstablishment became increasingly apparent, by reason of the unsettlement of business by the War of 1812, and the overissue of bank paper and suspension of specie payments by the State banks. Accordingly, amidst hot political opposition, the second Bank of the United States was incorporated in 1816. Within two years, however, by reason of bad management and mistaken policies, which first encouraged over-expansion of credits and later drastically curtailed them, thereby ruining many State banks, the Bank had brought upon itself the intense hatred of the whole South and West. The disastrous effect of its banking policies was enhanced by the fact that the business of the country was already in a serious condition, owing to the flood of cheap imports following the close of the war, the overdevelopment of manufacturing caused by the tariff of 1816 and the general extravagance. As a result, when a terrible financial stringency and business distress ensued, and practically all the State banks in Kentucky, Ohio, Western Pennsylvania and North and South Carolina stopped payment, the general public placed the responsibility on that "monster", the Bank of the United States. Radical legislation was at once enacted by its opponents. Indiana in its Constitution of 1816 prohibited the establishment of branches of any bank chartered outside the State. The Illinois Constitution of 1818 prohibited the existence of any but State banks within the State. In November, 1817, Tennessee imposed a tax of $50,000 on any other than a State bank doing business in the State; in December, 1817, Georgia laid a tax of 31¼% on every $100 of bank stock employed within the State (the Legislature declaring by resolve, the next year, that this tax was only intended to apply to branches of the Bank of the United States); North Carolina, in Decem-

ber, 1818, imposed an annual tax of $5000 on the branches of the Bank. In February, 1818, there was enacted in Maryland a statute laying a heavy stamp tax on all notes issued by banks chartered outside the State, which tax might be commuted by the annual payment of $15,000; in January, 1819, Kentucky imposed a still heavier tax, compelling each branch in that State to pay $60,000 annually; the next month, February, 1819, Ohio rivaled Kentucky with a tax of $50,000 on each branch.

Meanwhile, reckless mismanagement, wild speculation in its shares, and fraudulent and unwarranted overloans made by bank officials to themselves and others in the Pennsylvania, Maryland and Virginia branches, had brought the Bank to the verge of insolvency. By defalcations and other frauds, in the Maryland branch alone, there had been a loss of $1,700,000. It was amidst such untoward conditions that the case of *McCulloch* v. *Maryland*, 4 Wheat. 316, involving the right of the State of Maryland to tax this Federal banking institution, came before the Court, in February, 1819. This case was an action of debt by one John James, suing as an informer in behalf of himself and of the State, to recover a penalty of $100 from James W. McCulloch, the cashier of the Bank, for circulating a banknote unstamped, in violation of the Maryland taxing statute. It had been brought, May 8, 1818, in the County Court of Baltimore County, and, after decision in favor of the State, had been immediately appealed to the Maryland Court of Appeals on an agreed statement of fact, the Attorney-General of Maryland, Luther Martin, and the United States officials coöperating to make it a test case. Decision being rendered, in June, 1818, in favor of the constitutionality of the Maryland tax law, a writ

of error was at once taken to the United States Supreme Court, where it was docketed on September 18, 1818. Six of the greatest lawyers in the country were retained for its argument — William Pinkney, Daniel Webster and United States Attorney-General William Wirt, in behalf of the Bank, and Luther Martin, Joseph Hopkinson of Philadelphia, and Walter Jones of Washington, for the State. Beginning on February 22, 1819, the argument proceeded for nine days as follows: Webster opened for the Bank and Hopkinson for the State; Hopkinson spoke all day, February 23; on February 24, Wirt argued for the Bank and Jones for the State; on February 25, Jones finished his argument, and Martin began his long argument which lasted through Friday and Saturday, February 26 and 27. Of Martin's effort, Judge Story later narrated that he ended by saying that he had one last authority which he thought the Court would admit to be conclusive, and he then read from the reports of Marshall's own speeches in the debates in the Virginia convention when the adoption of the Constitution was discussed, whereupon, said Story, Marshall drew a long breath, with a sort of sigh. After the Court adjourned, he rallied the Chief Justice on his uneasiness, and asked him why he sighed: to which Marshall replied, "Why, to tell you the truth, I was afraid I had said some foolish things in the debate; but it was not so bad as I expected." [1] On Monday, March 1, Pinkney began the argument which was to prove the greatest effort of his life, consuming three full days, ending on March 3, and described by Judge Story in a letter written on the last day: "I never, in my whole life, heard a greater speech; it was worth

[1] *Life of Alexander H. Stephens* (1883), by Richard M. Johnson and William Hand Browne, 183. Stephens by mistake stated that the counsel was Chapman Johnson of Maryland, instead of Luther Martin.

a journey from Salem to hear it; his elocution was excessively vehement, but his eloquence was overwhelming. His language, his style, his figures, his arguments were most brilliant and sparkling. He spoke like a great statesman and patriot, and a sound constitutional lawyer. All the cobwebs of sophistry and metaphysics about State rights and State sovereignty he brushed away with a mighty besom. We have had a crowded audience of ladies and gentlemen; the hall was full almost to suffocation." [1] The importance of the questions at issue was fully realized at the time, as shown by the account given in the *National Intelligencer*, which said that: "The argument has involved some of the most important principles of constitutional law which have been discussed with an equal degree of learning and eloquence and have constantly attracted the attention of a numerous and intelligent auditory, by whom the final decision of this most important question from the Supreme Tribunal of the country is anxiously expected." And *Niles Register* also said: "The discussion has been very able and eloquent, it involves some of the most important principles of constitutional law and the decision is anxiously expected." [2]

Though the Court was then composed of only two

[1] *Story*, I, letter of March 3, 1819; *National Intelligencer*, Feb. 25, 1819.

[2] Of Pinkney's argument, a correspondent of the *Baltimore Patriot* wrote: "I had anticipated much from this distinguished man, but he far surpassed my utmost expectations. His speech, or rather his series of speeches, were the finest specimens of Bar oratory I have heard since I have been in the United States. The memory, the fancy and the judgment were combined to pour on this important question a flood of light. . . . He has spoken *con amore* of the constitutional government of the republican empire, and its high attributes. He has convinced his hearers that it cannot be practically enforced so as to secure the permanent glory, safety and felicity of this great country but by a fair and liberal interpretation of its powers, that these powers could not be expressed in the Constitutional charter; many of them must be taken by implication; and that the sovereign powers of the Union are supreme." Quoted in *Kentucky Gazette*, March 26, 1819, and *Knoxville Register*, March 30, 1819. See also *National Intelligencer*, Feb. 25, 1819; *Niles Register*, Feb. 27, 1819.

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Federalists (Marshall and Washington) and of five Republicans (Johnson, Livingston, Todd, Duval and Story), there seems to have been little doubt expressed at the time as to the probability of a decision adverse to the State. "I have no doubt of the result," wrote Webster to Jeremiah Mason before his argument; and "of the decision I have no doubt," he wrote again, after his argument.[1] On the floor of Congress, as early as February 24, it was stated that there was reason to believe that the Court would "determine that the United States Bank has a right to extend her branches over every individual State in the Union, and the States have no right to prune them." Partly because of this belief as to the approaching judicial decision, there ensued in the House of Representatives, during the very days of the argument in Court, a heated debate over a bill to repeal the Bank's charter. Through this debate, the *Dartmouth College* decision, rendered only three weeks before, was curiously interwoven with the *McCulloch Case*; for some of the Bank's supporters denied the power of Congress to repeal, relying largely on this decision, but overlooking the fact that the prohibition in the Constitution against impairing the obligation of contracts was directed only against State action. Congress has no power to repeal, argued Louis McLane of Delaware. "The charter is a contract under decision of our own Courts." "Chartered rights are sacred things. . . . Violation of charters has ever been deemed an enormous grievance," argued John Sergeant of Pennsylvania. "If a Legislature assumes the power of annulling contracts, it loses the privilege of making them," said William Lowndes of South Carolina. On the other hand, James Pindall of Virginia pointed out that the Constitution forbade the

[1] *Mason*, letter of Feb. 15, 23, 1819; *Webster*, XVI.

States only, and not Congress, to repeal charters; that Congress had full power, subject only to its exercise under "precepts of justice and morality." [1] Had Congress passed this repealing act, as the Bank's opponents were urging, the *McCulloch Case* would, in all probability, have never been decided by the Court, as it would have become a moot matter. Congress, however, failed to act; and on Saturday, March 6, 1819, only three days after the close of Pinkney's argument, Marshall rendered the unanimous judgment of the Court, upholding the power of Congress to charter the Bank as a Federal agency, sustaining the exclusive right of Congress to control such Federal agency, denying the right of the State to interfere with the Federal Government by taxing such an agency, and holding the State tax law invalid. The Constitution, he said, did not profess to enumerate the means by which the powers it granted may be executed. It left with Congress a choice of any means "calculated to produce the end"; and in ever immortal words, the Chief Justice summed up: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." That a bank "is a convenient, a useful and essential instrument in the prosecution of the Government's fiscal operations," was, he said, not a subject of controversy. Being an appropriate measure, the degree of its necessity was solely for the consideration of Congress. As to the question of the right of the State to tax the operations of such a Federal instrument, the Chief Justice, at the outset of his opinion, had shown his appreciation of the deli-

[1] *15th Cong., 2d Sess.*, Feb. 18, 22, 23, 24, 1819.

cacy of the situation, involving the conflicting powers of the Government and of the States. "No tribunal can approach such a question," he said, "without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made." And after full consideration of the rights and sovereignty of the States, he announced the conclusion that the question was one of supremacy, "and if the right of the States to tax the means employed by the General Government be conceded, that declaration that the Constitution and the laws made in pursuance thereof, shall be the Supreme law of the land, is empty and unmeaning declamation."

The importance of this decision was at once appreciated; and it was reprinted in full by many newspapers throughout the country, irrespective of their concurrence in its doctrines. The reaction of the public was on sectional and political lines. The North and the East, where the Bank was less unpopular and where its operations had produced less financial distress, naturally supported the decision. On the day after the delivery of the opinion, Judge Story wrote: "It excites great interest, and in a political view is of the deepest consequence to the Nation. It goes to establish the Constitution upon its great original principles." Webster wrote to Story, a few weeks later, that the opinion was "universally praised. Indeed, I think it admirable. Great things have been done at this session." "The Supreme Judicial authority of the Nation has rarely, if ever, pronounced an opinion more interesting in its views or more im-

portant as to its operation," [1] said the *National Intelligencer* editorially. The *Boston Daily Advertiser's* Washington correspondent wrote: "It is one of the most able judgments, I will venture to say, ever delivered in this Court, and when it is read will satisfy all minds"; and in the *Columbian Centinel*, a Washington correspondent wrote of the opinion as "drawn up with his usual force and sound argumentation. . . . I congratulate you on this result, so important to the preservation of the Constitution." [2] The *Franklin Gazette* of Philadelphia spoke of the decision as "one of primary importance to the interests of the country . . . as, from the acknowledged wisdom and virtue of the tribunal whence it emanates, it must be regarded as finally and conclusively settling a question which has distracted the country more, perhaps, than any that has yet been started under the Federal Constitution." [3] The *Philadelphia Union* said that: "All these decisions are of great interest and importance, both intrinsically and as they go to exemplify the salutary and superintending control which that Court holds over many of the acts of the individual States. Though State pride may take the alarm at the exercise of this control, we cannot but view it as a power very wisely given and judiciously vested for the purpose of repressing extravagant and selfish acts on the part of the State Government." [4] There were also some Southern and

[1] *National Intelligencer*, March 13, 1819, publishing the opinion in full. *Boston Daily Advertiser*, March 13, 1819; *Columbian Centinel*, March 13, 1819; *Story*, I, 325; *Webster*, XVI.

[2] The *New York Gazette* of March 10 thus announced the decision, in a Philadelphia dispatch dated March 8 "The important question solemnly decided. We have the satisfaction to state that, by express advice from Washington, intelligence is received that on Saturday last (March 6) in the Supreme Court, Chief Justice Marshall delivered the opinion in the case of *McCulloch* v. *The State of Maryland*, and that opinion pronounced the Bank of the United States constitutional and declares all attempts on the part of the State to tax it unconstitutional and void."

[3] See *Independent Chronicle*, March 17, 1819.

[4] Quoted in *Kentucky Gazette*, April 9, 1819, and many other newspapers.

Western newspapers which joined in support of the Court. Thus a Virginia paper said: "We have seldom, if ever, seen, amongst the number of important questions of constitutional law which have been decided by the Supreme Judicial authority of the Nation, one of equal importance, or one which has been investigated with equal talent." A leading Georgia paper said that it was "a very interesting adjudication", and that the contest between the National and State banks would now go on until one or the other was rooted out. "In such a struggle, we should hope, as the least of two evils, that the Bank of the United States should prevail, for in banking, as in government, one tyrant may be better endured than two or three hundred." [1] A leading Kentucky paper termed the opinion "the ablest document we recollect to have read of a judicial nature"; and it said that: "The mighty arm of the Judiciary has interposed its high and almost sacred functions for the purpose of giving effect to a provision of the Federal Constitution by which Congress are authorized to carry into execution expressly delegated powers — to preserve the supremacy of the Union over State encroachments, and at the same time not to interfere, in the least possible manner, with the legitimate rights of the individual States." Another prominent Kentucky paper stated that, whatever sentiments were entertained as to the correctness of the decision, it ought to be respected and supported by all good citizens, so long as it stood unreversed, and that a respect for all the constitu-

[1] *Norfolk Herald*, March 19, 1819; *Augusta Chronicle*, and *Georgia Gazette*, March 31, 1819; *Kentucky Gazette*, March 26, 1819. In its issue of March 19, 1819, it had said: "This interesting decision cannot be too highly appreciated, and it will furnish a happy lesson to local politicians against their right to infringe upon the National Constitution or upon the laws of Congress. We hope to see no more interference by State Legislatures." The *Richmond Enquirer*, April 26, 1819, quoted the *Charleston Patriot* (S. C.), and the *Kentucky Reporter* also as indorsing the decision.

tional departments of the Government was essential to the preservation of our republican institutions. "The opinion embraces the fundamental principles of our Government, and must have an important bearing on all its operations. It is discussed too in a strong, lucid, masterly manner; the constitutionality of a National Bank is supported with a strength and fairness of reasoning which we have seldom if ever seen surpassed and the unconstitutionality of an attempt by the States to tax such an institution — if not established to the satisfaction of every reader — is at least maintained with distinguished ability. . . . At all events — whatever opinions may be entertained — we trust we shall have no forcible resistance to the laws of the United States — no contemptuous violations of judicial decisions — no acts of hostility to the government of the Union. Let the States support their rights, and even their imagined rights, with dignity and firmness, but not with intemperance or passion — let them adopt regular constitutional means, and if these will not avail them, let them *calmly* consider whether the object contended for is of sufficient importance to warrant a resort to civil war and hazard a dissolution of the Union of States. . . . Let us be cautious at least how we resort to mob-law for redress." [1]

On the other hand, most of the Southern and Western States were violent in their denunciation of the decision. It is to be noted, however, that this antagonism to the Court arose, *not* from its exercise of its power to hold an Act of Congress invalid, but from its failure so to do. It was the support which the Court gave to the wide scope of Legislative power and to the authority of Congress to charter a National Bank which inspired Jefferson and his followers with alarm. They had

[1] *Western Monitor* (Lexington, Ky.), April 3, 10, 1819.

no fear of the Court as an instrument in restricting Congress, but they viewed it with grave concern as an instrument of encroachment upon the alleged rights of the States. It was in Virginia that, naturally, the most serious criticisms were leveled at the decision, which, it was noted, had been concurred in by four members of the Court appointed by Jefferson and Madison. As early as March 24, 1819, Marshall wrote to Judge Story that: "Our opinion in the Bank case has aroused the sleeping spirit of Virginia, if indeed it ever sleeps. It will, I understand, be attacked in the papers with some asperity, and as those who favor it never write for the publick, it will remain undefended and of course be considered as damnably heretical." And on May 27, he wrote again: "The opinion in the Bank case continues to be denounced by the democracy in Virginia. An effort is certainly making to induce the Legislature which will meet in December to take up the subject and to pass resolutions not very unlike those which were called forth by the Alien and Sedition Laws in 1799. Whether the effort will be successful or not may perhaps depend in some measure on the sentiments of our sister States. To excite this ferment, the opinion has been grossly misrepresented; and where its argument has been truly stated, it has been met by principles one would think too palpably absurd for intelligent men. But prejudice will swallow anything. If the principles which have been advanced on this occasion were to prevail, the Constitution would be converted into the old Confederation." [1] Those who led the attack

[1] *Mass. Hist. Soc. Proc. 2d Series,* XIV. Marshall wrote, under the *nom de plume* of "A Friend of the Union", a long paper supporting his decision against Roane's attacks and secured its publication, through Judge Bushrod Washington, in the *Philadelphia Union,* April 24, 1819. See his letters to Story, May 27, July 13, 1819, quoted in *Marshall,* IV, 318 *et seq.*

in Virginia were Spencer Roane, Judge of the Court of Appeals (writing in the newspapers under the pen names of "Hampden" and "Amphictyon"),[1] Thomas Jefferson, James Madison and Thomas Ritchie, the editor of the *Richmond Enquirer*.[2] "If such a spirit as breathes in this opinion is forever to preside over the Judiciary, then indeed it is high time for the State to tremble . . . all their great rights may be swept away one by one," wrote Ritchie. "If Congress can select any means which they consider 'convenient', 'useful', 'conducive to' the execution of the specified and granted powers; if the word 'necessary' is thus to be frittered away, then we may bid adieu to the sovereignty of the States; they sink into contemptible corporations; the gulf of consolidation yawns to receive them. This doctrine is as alarming, if not more so, than any which ever came from Mr. A. Hamilton on this question of a bank or of any other question under the Constitution. . . . The people should not pass it over in silence; otherwise this opinion might prove the knell of our most important State rights. This opinion must be controverted and exposed." Again, he wrote that while the Court was "a tribunal of great and commanding authority" whose decisions were always entitled to the deepest attention, and while he was always ready to pay to the Chief Justice "that tribute which his great abilities deserved", nevertheless, he believed that the opinion in this case was "fraught with alarming consequences", and "threatened with danger" the rights of the States and of

[1] Spencer Roane, as early as 1793, had held in *Kamper* v. *Hawkins*, 1 Va. Cases, 20: "My opinion on more mature consideration is changed in this respect, and I now think that the Judiciary may and ought not only to refuse to execute a law expressly repugnant to the Constitution, but also one which is, by a plain and natural construction, in opposition to the fundamental principles thereof."

[2] *Richmond Enquirer*, March 26, 30, April 2, 13, 16, 23, 26, 30, June 11, 15, 18, 22, 1819; *John P. Branch Historical Papers* (1906), (1907).

the people.[1] Roane under the name of "Amphictyon" wrote that the principles enounced by the Court "tend directly to consolidation of the States and to strip them of some of the most important attributes of their sovereignty. If the Congress of the United States should think proper to legislate to the full extent upon the principles now adjudicated by the Supreme Court, it is difficult to say how small be the remnant of powers left in the hands of the State authorities." Madison, writing to Roane, criticized the Chief Justice for laying down any general doctrine, and for deciding more than the single question then before him. "The occasion did not call for the general and abstract doctrine interwoven with the decision of the particular case. I have always supposed that the meaning of a law, and for a like reason, of a Constitution, so far as it depends on judicial interpretation, was to result from a course of particular decisions, and not these from a previous and abstract comment on the subject. The example in this instance tends to reverse the rule." And he deplored the high sanction "given to a latitude in expounding the Constitution which seems to break down the landmarks intended by a specification of the powers of Congress, and to substitute for a definite connection between means and ends a Legislative discretion as to the former to which no practical limit can be assigned. . . . It was anticipated, I believe, by few if any of the framers of the Constitution, that a rule of construction would be introduced as broad and pliant as what has occurred. And those who shared in what passed in the State conventions thro' which the people ratified the Constitution, with respect to the extent of the powers vested in Congress, cannot easily be persuaded that the avowal of such

[1] See *Thomas Ritchie* (1913), by Charles H. Ambler.

a rule would not have prevented its ratification." [1] Jefferson wrote to Roane, that he had read his letters in the *Enquirer* "with redoubled approbation", and although the election of 1800 had overthrown the old Federalist principles of Government, he said, nevertheless, the Judiciary "has continued the reprobated system, and although new matter has been occasionally incorporated into the old, the leaven of the old mass seems to assimilate to itself the new, and after twenty years . . . we find the Judiciary on every occasion still driving us into consolidation. In denying the right they usurp of exclusively explaining the Constitution, I go further than you do." [2] That Jefferson, however, did not mean to deny the power of the Judiciary to pass on the validity of the statute is seen from the fact that he deplored its failure to hold the Bank charter unconstitutional. His position was now the same as twenty years previous, namely, that the Legislative and Executive branches of the Government were not obliged to accept the Court's decision, but that each "has equally the right to decide for itself what is its duty under the Constitution." The opposition of Virginia finally culminated in December, 1819, when, in the House of Delegates, a paper of instructions to the United States Senators, Barbour and Pleasants, was introduced and referred to the Committee of the Whole, stating that the Legislature had seen the recent decision "with much concern and alarm"; and that the powers attributed to the General Government are "eminently calculated to undermine the pillars of the Constitution itself, and to sap the foundations and rights of the State Governments." It expressed a "most solemn protest" against the de-

[1] *Madison*, VIII, letter of Sept. 2, 1819.
[2] *Jefferson*, XII, letter of Sept. 6, 1819.

cision and the principles contained in it; and recommended the creation of a new tribunal to adjudicate questions involving State and Federal powers. These resolutions were in substance adopted, February 12, 1820; and a resolution on the then pending Missouri Compromise, enouncing similar views, was also passed.

Other States of the South joined in Virginia's views. A Mississippi newspaper said that: "The last vestige of the sovereignty and independence of the individual States composing the National Confederacy is obliterated at one fell sweep. But we know not that it matters much, for our privileges as a people have been of late so frittered away that we may as well inter at once the form of a Constitution, of which the spirit has been murdered. In truth, the idea of any country's long remaining free, that tolerates incorporated banks, in any guise or under any auspices, is altogether delusive." [1] A Tennessee paper said that: "This Court, above the law and beyond the control of public opinion, has lately made a decision that prostrates the State sovereignty entirely. The extraordinary determination to prevent the States taxing the capital of the United States Bank, and the decree declaring the State insolvent laws unconstitutional has awakened public attention to the aristocratical character of the Court, and must sooner or later bring down on the mem-

[1] *Natchez Press*, quoted in *Niles Register*, XVI, May 22, 1819; *Nashville Clarion*, quoted in *Scioto Gazette*, April 16, 1819; *Georgia Journal*, April 6, 13, 1819; *Argus of Western America* (Ky.), March 26, April 16, 1819, and *passim* in May and June, 1819; the *Philadelphia Gazette* said editorially: "The decision of the Supreme Court as related to the Bank of the United States will no doubt excite a strong sensation in some of the Western States. It is from that quarter principally that the greatest hostility to that institution has proceeded, and it is in that quarter if the Bank were disposed to retaliate on the Seminole principle, the greatest distress and moneyshed would take place. Kentucky and Tennessee, foremost in ranks of heroes and patriots, would be the last in the march of specie payments. Let them, therefore, honorably unite in supporting the measures and decisions of the constituted authorities. They have everything to fear from acts of violence; they have everything to expect from discreet and moderate measures."

bers of it the execration of the community. . . . We are consoled with the idea that the public opinion will not support the Supreme Court. Our government is made for the people, not the people for governors." A Georgia paper viewed the situation as critical, and said that the opinion "exhibited an unusual appearance upon our political horizon, and if not big with disaster, at least alarming in aspect. It is not the only omen that has lately hung upon our view, foreboding mischief to the State Sovereignties; and a warning voice cannot be raised too soon or too loud to awaken the States to a sense of their danger; when another military Chieftain shall with impunity openly insult the Governor of a State; when another new State shall be rejected from the Union unless trammeled and restricted, and when another Supreme Court shall sit in judgment on the State laws, depend upon it, the crisis is at hand; the moderation of a generous and forbearing people will be tried to the bottom." A Kentucky paper said that the principles of the decision "must raise an alarm throughout our widely-extended empire. They strike at the roots of State-Rights and State Sovereignty. . . . The National Government is again encroaching on the right of the States and the people. There must be a fixed or determined resistance of these encroachments, not of arms, but of the moral energy of a free people"; and it expressed its fear lest in the future, whatever was thought "convenient by Congress" would become constitutional. "Some excuse, some pretence of conveniency in carrying into effect specified powers may be found to justify the incorporation of companies with a monopoly of trade, of individuals for the purpose of farming out the revenues, of companies for the purchase of public lands, and perhaps even of a National church to correct and maintain morality among the

people, without which none of the specified powers of the Constitution could be carried into effect." Ohio newspapers were particularly violent in their denial of the doctrines advanced by the Court.

In South Carolina, such extreme fear of the Bank and of the results of the decision on the *McCulloch Case* was expressed by counsel, Robert Y. Hayne, and William H. Drayton, in a noted case argued in the spring of 1819, that a dissenting Judge, in giving his opinion, felt called upon to controvert the need for such alarm: [1]

> The strong ground on which the motion is attempted to be supported appears to me to be, that this is a great monied monopoly, which, in the hands of the General Government, will become a gulph, in the vortex of which every minor institution will be swallowed up. It has been compared to the lever of Archimedes by which the Constitutions of the States may be overturned. But here the maxim well applies, that with the policy of the measure, we have nothing to do. . . . But why this alarm at the exercise of the legitimate powers of the General Government. The jealousy of the States is ample security against an invasion of their rights, and they have ample means to prevent or resist it. If the powers of Congress are too great, they may be abridged by an amendment of the Constitution. If they are abused, they may be corrected by a change of representation. If they are exceeded, they may be controlled by the Judiciary. But to give to one Government the power of passing laws, and to another the right to resist them or defeat their operations . . . would necessarily lead to a contest for power.

The opposition, however, was not confined to the South and the West. A leading Democratic newspaper in New Jersey said: "If Congress may incorporate banking companies, notwithstanding the want of specific constitutional authority, and in defiance of the general constitutional prohibition, we scarcely know what they

[1] *Bulow* v. *City Council of Charleston*, 1 Nott and McCord, 527.

may not do! And if the Supreme Court of the United States may thus confirm and establish questionable Acts of Congress and annul deliberate Acts of the individual States, we frankly acknowledge we see nothing to prevent a gradual invasion of State right, an ultimate annihilation of State sovereignties, and a consequent accumulation of all Legislative, Executive and Judicial powers in the hands of the General Government." And *Niles Register* in Maryland delivered a long series of attacks upon the decision which were republished in papers throughout the country.[1] It early termed the opinion "a total prostration of the State-Rights and the loss of the liberties of the Nation", and said that: "A deadly blow has been struck at the Sovereignty of the States, and from a quarter so far removed from the people as to be hardly accessible to public opinion. . . . Nothing but the tongue of an angel can convince us of its compatibility with the Constitution. . . . Far be it from us to be thought as speaking disrespectfully of the Supreme Court, or to subject ourselves to the suspicion of a contempt of it. We do not impute corruption to the Judges, nor intimate that they have been influenced by improper feelings, — they are great and learned men; but still, only men. . . . We are awfully impressed with a conviction that the welfare of the Union has received a more dangerous wound than fifty Hartford Conventions, hateful as that assemblage was, could inflict, — reaching so close to the vitals as seemingly to draw the heart's blood of liberty and safety, and which may be wielded to destroy the whole revenues, and so do away the sovereignties of the States. . . . The principles established . . . are far more dangerous to the

[1] See *Scioto Gazette*, and *Liberty Hall and Cincinnati Gazette*, April 30, 1819; *Niles Register*, XVI, March 13, 1819, and see pp. 41 *et seq.*, 46, 65, 103, 145, March 13, 20, April 3, 24, 1819.

Union and happiness of the people of the United States than anything else that we ever had to fear from foreign invasion. A judicial decision which threatens to annihilate the sovereignties of the States; which will sanction any species of monopoly and make the productive many subservient to the unproductive few,— it creates a most disgusting monopoly. The reasoning of the opinion exhibits a catching at words, and an establishment of facts by implication, with a Sibylline mystery thrown over things hitherto supposed to be very comprehensible, embellished too with a lawyer-like pleading that we wish had been dispensed with."

In the *General Advertiser*, in Philadelphia, there also appeared an editorial which criticized even the ability of Marshall's opinion, a quality which his bitterest opponents elsewhere had never challenged: "Any man, who is conscious of his own virtue and possessing a plain understanding, who will take up the opinion of Chief Justice Marshall on the Bank, will find a most lamentable sophistry, a most lame and impotent logic, and such a production, as we must say, because we most solemnly think it, the most flimsy and false attempt at reasoning that can be found in the annals of any nation. Whether it be worth the while to take it up and analyze it, we are unable at this moment to form a judgment; that it requires little pains to penetrate the monstrous tissue of weaknesses of which it is composed and which, like a net, presents only slight lines, whereby the general vacancy is seen through them, is most certain." The same paper further published a series of letters signed "Brutus" containing the most savage onslaught made anywhere, of which the following is an illustration:[1]

[1] *General Advertiser*, March 17, 23, 1819; and see letters of "Brutus", March 22, 26, 29, 31, April 2, 1819. See also letter of "Hancock", March 25, defending

To say that we anticipated some novelty of reasoning, or some fresh discovery of occult relations in the arcana of corruption, and that we were of course not disappointed, would be saying little; for this at least was to be expected, from a Court composed of such aristocratical principles and forming an essential part of the prevailing system of impure power and exorbitant ambition. But we did most firmly expect to behold this important, this solemn, this awful subject, treated in a dignified, a skilful and a scientific manner; although we never cherished the feeblest hope that impartiality, liberty, or reason, would characterize its discussion or bias its determination. . . . The temper of high toned aristocracy, long known to pervade the bench of this Court, would necessarily preclude even a calculation as to the impartial, rigorous and comprehensive consideration of this fundamental article of American freedom. And the opinion of that tribunal now before the world is a perfect model of that prejudiced judgment and *ex parte* consideration of a subject that springs from a predetermined resolution to accomplish a desired object, which shows but one side of the question, views but one relation of the principles in controversy, and studiously avoids all allusion to the most essential and the principal leading features in the discussion. — *The foundation of social obligation — The Purpose of Government — The Rights of the People — and The Liberty of the States.* These principles and rights are rigorously excluded from all consideration in this argument; and the power, the authority, and the supremacy of the Federal Government is made the irreferable authority, the original source, and the sole origin, and the despotic arbiter of a question which challenges and denies the extent of that supremacy of power, that unresisting vigor of authority. . . . Never was a bad cause worse supported by constellated talents, learning, and wisdom of a Bench of Supreme Judges. It seems as if nature had revolted from the debasing task assigned them; and that their reason and their judgment had forsaken them, upon an instinctive horror and disgust for the destructive purposes they were pledged to fulfil, in defiance of all human

the Court against the charge that "one of the fundamental rights of the State Constitutions has been wrenched from their hands by an arbitrary decree of corrupt power"; see also editorials, March 17, 23, 24.

rights, human joys, and divine commandments. I feel a pang of despair for my country, when I think of the tyrannical purpose for which they pronounced their false judgment upon this subject, but I blush for its fame, in addition to this feeling, when I reflect on the flimsy and contemptible defence thus set up in support of a bad and destructive engine of power.

Criticism, so wild and so violent, undoubtedly defeated its own purpose; and the country at large declined to believe that the predicted disasters to its form of constitutional government would follow from the decision. As the *Southern Patriot*, a Federalist paper in Charleston, conservatively said: "The tendency of the language applied by some of the public journals to the late decision is to create unnecessary alarm in the public mind. The entire ruin and prostration of the State government is the sombre prophecy of those who regard the principles of this decision with a sort of patriotic horror, and whose fancies seem startled by an empty phantom. We behold not the smallest ground for all this apprehension and evil augury." [1]

Of the evil effect of the decision upon the financial conditions of the country, there was more ground for fear; and a very strongly supported movement arose for the adoption of a Constitutional Amendment to confine National Banks to the District of Columbia. The Pennsylvania Legislature passed a resolution asking Congress for such an Amendment; and Tennessee, Ohio, Indiana and Illinois formally approved the request. The Legislatures of Virginia, South Carolina and New York also considered the question. Senator Logan of Kentucky introduced in the Senate, December 28, 1819, a resolution to this effect: [2]

[1] Reproduced in *National Intelligencer*, April 22, 1819.

[2] *16th Cong., 1st Sess.*, Dec. 28, 1819, Jan. 4, 5, 26, Feb. 16, 1820, in the Senate; Jan. 31, 1820, in the House.

Resolved, that as the content and happiness of the people cannot be expected, under collisions and the want of harmony between their governments, that, therefore, the Committee on the Judiciary be instructed to inquire whether provisions may not be duly made by law for the removal, from any State, of the branches of the Bank of the United States, upon the request of the Legislature of such State; except during those periods of war, when the public good and the exigencies of the nation shall otherwise require.

And in debate, he said: "Whithersoever we look, whether to the East or to the West, to the North or to the South, we are presented with some portending events, connected with this subject, of an unfavorable aspect. Why, therefore, hesitate to leave with the State Governments and your banks to make their own bargain, or otherwise provide for their withdrawal, in order to save the peace and tranquility of society? If they can harmonize, you may then expect it; and, if they cannot, why continue the spirit of discordance, to the great detriment of governmental unity and friendly understanding?" Congress, however, took no action.

It remained for the State of Ohio to take definite action in opposition to the Court and its decision, and to translate its hostile sentiments into action. Nowhere had the newspaper criticism been more violent than in that State. One paper, in an editorial headed "The United States Bank — Everything! The Sovereignty of the States — Nothing!" termed the decision of the Federal Court of Kentucky,[1] enjoining the collection of the Kentucky tax on the Bank, "Usurpation No. 1"; and the decision of the *McCulloch*

[1] Feb. 26, 1819, Judges Todd and Trimble in the Federal Circuit Court at Lexington, Ky., had enjoined proceedings under the Kentucky tax law until the regular session in May, and until the Supreme Court should decide the Maryland case. See editorial in *Western Monitor*, March 6, 1819.

Case, "Usurpation No. 2", and said: "This monster of iniquity is to be saddled upon us. The people of the West are to be taxed by an incorporation unknown to our Constitution, and only known to us by its oppressive and vindictive acts, as being the means by which the bread of industry has been taken from the poor and given to the rich, by which our manufactories have been paralyzed, and the introduction of foreign luxuries promoted, by which our precious metals have been collected and transported from among us, and by which the best of our local banks have been driven to the necessity, either of adding to the ruin and desolation it has produced by calling in their debts, or sacrificing their own credit and reputation by ceasing to redeem their notes on demand." [1] Another prominent paper said that while it had "no disposition to quarrel with the legitimate expounders of the Constitution and laws of the Union", and while the arguments of the Chief Justice appeared to be conclusive, nevertheless, clearly, "if some expressions in the Constitution are not rendered more definite by amendments, there is danger of a concentration of powers in the General Government that will sooner or later crush the State sovereignties". . . "It is apparent that great dissatisfaction prevails respecting this decision, and we should not be surprised if the Court should be called upon to revise it, by the perseverance of some of the States in asserting their claim to the right of taxation." [2]

[1] *Western Herald and Steubenville Gazette*, March 20, 1819.

[2] *Liberty Hall and Cincinnati Gazette*, April 2, 13, 1819. Charles Hammond, a leading Ohio lawyer wrote, *ibid.*, April 6, 1819: "I have never yet seen or heard an argument advanced in support of the principles of the decision, that appeared to me worthy of refutation. If, however, the country must be prostrated at the feet of an overbearing stock-jobbing aristocracy, I most earnestly wish that all may be satisfied that the outrage is warranted by the Constitution. Should the reasoning of the Court fail in giving this general satisfaction, I hope the freemen of Ohio

Opposition to the Court's decision in Ohio, however, was based not so much on political or legal grounds as on the financial and economic conditions then existing.[1] No State had suffered more in 1818 from wild inflation and commercial failures than had Ohio; and the Legislature, attributing all its financial distress to the operation of the Bank, had enacted, on February 8, 1819, an exceedingly stringent act, imposing an annual tax of $50,000 on each branch of the Bank.[2] In spite of the decision of the *McCulloch Case* in March, the State at once determined to disregard it, claiming that the case had been a fictitious one, based on agreed facts which were not binding in Ohio, manufactured for the purpose and hurried up to the Supreme Court for the purpose of saving the Bank "then on the brink of destruction", from the effects of its "extravagant and fraudulent speculations." "At this critical juncture of its affairs," said Ohio officials, "it was a manœuvre of consummate policy to draw from the Supreme Court a decision that the institution itself was constitutionally created, and that it was exempt from the taxing power of the States. This decision served to prop its sinking credit; and if it inflicted a dangerous wound upon the authority of the States, this might be but a minor consideration. It is truly an alarming circumstance, if it be in the power of an aspiring corporation and an unknown and obscure individual, thus to elicit opinions, compromitting the vital

feel enough of the spirit of independence to afford the Judges an opportunity of reviewing their opinion. It is time enough to succumb when the Western States have been heard, and when their rights have been decided upon in a case where they are themselves parties." See also *Scioto Gazette*, April 8, 1819.

[1] See *Banking and Currency in Ohio before the Civil War* (1915), by C. C. Huntington, 313 *et seq.*

[2] Law of Feb. 8, 1819. Under this act, the State Auditor was authorized in collecting the tax to go into every room, vault, and other place in the branch Bank and to open every chest or receptacle in search of whatever might satisfy the warrant.

interests of the States that compose the American Union." [1]

As it was evident that the State was intending to enforce its law, regardless of the Court's decision in the Maryland case, the Bank sought protection of its rights, by filing a bill in equity in the Federal Circuit Court, September 11, 1819, four days before the date when the law authorized the tax levy; and it obtained a temporary injunction against Osborn, the State Auditor. Considering the service of the injunction to be imperfect, Osborn ignored it and delivered the tax warrant to his assistant, John L. Harper, who, on September 17, went to the branch office of the Bank, and, after demanding and being refused payment of the tax, entered the vaults, and took away whatever specie and notes he could find, amounting to $120,475. News of this high-handed proceeding

[1] See Report of the Committee of the Ohio Legislature, Dec. 12, 1820: "Upon the promulgation of this decision (*McCulloch* v. *Maryland*), it is maintained that it became the duty of the State and its officers to acquiesce, and treat the act of the Legislature as a dead letter. The Committee have considered this position, and are not satisfied that it is a correct one. . . . This case . . . was an agreed case, made expressly for the purpose of obtaining the opinion of the Supreme Court of the United States upon the question whether the States could constitutionally levy a tax upon the Bank of the United States. This agreed case was manufactured in the summer of the year 1818, and passed through the County Court of Baltimore County, and the Court of Appeals of the State of Maryland in the same season, so as to be got upon the docket of the Supreme Court of the United States for argument at their February Term, 1819. It is only by management and concurrence of parties that causes can be thus expeditiously brought to a final hearing in the Supreme Court."

The same view was maintained in the *Steubenville Herald*, quoted in *Niles Register*, XVII, Oct. 30, 1819: "If a case decided, an agreed case, — in which this State is not a party, can be considered binding upon this State, if such decision is to suspend the force and operation of our laws legally, regularly and constitutionally enacted, what are our boasted privileges? . . . We complain that in the case of *McCulloch* v. *Maryland*, matters have been conceded by the latter, or rather, many of the strongest grounds were relinquished or not brought into view, on which this State meant to reply. The State of Ohio does not admit that a case between any two parties, collusively or ignorantly agreed upon, is or ought to be binding on any other party."

On the other hand, the *Scioto Gazette*, Feb. 28, 1824, repelled this insinuation "artfully thrown out that the case of *McCulloch against Maryland* was got up and decided on fraud, an insinuation which is not warranted by the facts."

reached the Bank's lawyers at once; and they quickly completed service of the injunction on Harper, as well as on Osborn, on September 18. In direct disregard of the injunction, however, Harper continued on his way to Columbus in his wagon with the cash and notes, and conveyed them to the State Treasurer.[1]

Thus the State of Ohio was placed, through her high State officials, in direct contempt of an order of the Federal Circuit Court, as well as in a position of refusal to conform to the principles laid down in a decision of the Federal Supreme Court.

When the news of this lawless proceeding reached the East, it caused immense excitement. Langdon Cheves, President of the Bank, wrote to Secretary of the Treasury Crawford, in protestation: "The outrage . . . can be rarely paralleled under a Government of Law; and, if sustained by the higher authorities of the State, strikes at the vitals of the Constitution." The Eastern newspapers were almost unanimous in condemnation.[2] The *New York Gazette* said: "Public opinion is pretty freely expressed concerning it. It is palliated in no Atlantic papers that we have seen, except the *Richmond Enquirer*." "The spirit of the Hartford Convention seems to have been translated to Ohio," said the *Franklin Gazette*. "The authors and abettors of this measure have much to answer

[1] See accounts from the *Chillicothe Supporter*, of September 22, and October 20, 1819, and the *Ohio Monitor*, of September 25, quoted in *Niles Register*, XVII, for October, November and December, 1819; and see *Niles Register*, Oct. 7, 1820.

[2] *New York Gazette*, Oct. 26, 1819; *Franklin Gazette*, quoted in *Washington Gazette*, Feb. 23, 1821; *Niles Register*, Oct. 2, 1819. *National Intelligencer*, Sept. 30, Oct. 13, 23, 25, Nov. 5, 6, 1819. The *National Advocate* (N. Y.), quoted in *ibid.*, Oct. 11, said: "We cannot avoid saying that Ohio has set a very discreditable example to the Union, which, if it should be followed, would render our institutions null and void, and shake that confederacy upon which the prosperity of the whole so much depends. . . . We trust that the State of Ohio will retrace her steps and prevent an adoption of coercive measures, by doing what is substantially right."

for," said the *National Intelligencer*. Even *Niles Register*, a pronounced adherent of States-Rights doctrine, and a consistent and active opponent of the Bank, declined to countenance the Ohio situation, saying editorially that: "Much as we are opposed to the principle and operation of the Bank of the United States — decided as we are in the opinion that Congress transcended its authority by incorporating it, and convinced also that the decision of the Supreme Court in the case of *McCulloch* v. *the State of Maryland* was wrong, yet believing that the States have a right to tax this institution and its branches — still we regret this act of Ohio. It is not for any of the States, much less individuals, to oppose force to the operations of the law, as settled by the authorities of the United States, however zealous we may be to bring about a different construction of it, through persons legally vested with power according to the Constitution to act in our name and in our behalf." A week later, it stated that the steps on the part of Ohio were very serious, and that a better plan would be for all States to submit, and to adopt a Constitutional Amendment against the right of the United States to incorporate banks. The Southern press, in general, refused to support Ohio's "rebellious conduct." A Georgia paper said: "It manifests a disregard to the union and harmony of the States, and a contemptuous defiance of the supreme constitutional authorities of the Republic. . . . When will the precise limits of the Federal powers be defined and permanently established, and when will the encroachments of the States upon the General Government cease?" A South Carolina paper said: "If one act of resistance of this kind admits of being palliated, on the ground that Congress has passed an unconstitutional law and the Supreme Court has sanctioned it,

why may not every act of resistance admit of the same defence?" [1]

On the other hand, the newspapers of Ohio were almost unanimous in upholding the action of the State authorities.[2] "In her controversy with the association of Pawn-brokers, nicknamed the Bank of the United States, the State of Ohio has succeeded in placing the dispute upon the proper ground. The doctrine of unlimited sovereignty, set up in the Supreme Court of the United States in the case of *Maryland and McCulloch*, can now be fairly tested, not by deciding a case made, but by enforcing those doctrines in an actual controversy for the money taken," said one. And another said that the State would proceed to collect the tax, "the case of *McCulloch* v. *the State of Maryland* to the contrary notwithstanding. . . . The State of Ohio is far from courting a collision with the Government of the United States . . . and knows when, how and where to draw the distinction between the Government and a pack of shavers and money changers." A Cincinnati paper said that the affair "appears to have created as much consternation as if it had been an overt act of treason or rebellion", and added: "If the General Government can create a monied institution in the very bosom of the States, paramount to their laws, then indeed is State sover-

[1] *Augusta Chronicle, Georgian, Southern Patriot*, quoted in *National Intelligencer*, Oct. 23, Nov. 6, 1809.

[2] See *New York Evening Post*, Oct. 13, 1819; *Niles Register*, XVII, Oct. 2, 9, 30, 1819. An Ohio correspondent of *Niles Register*, XVII, Jan. 1, 1820, wrote: "The execution of our law has given birth to a great deal of passion and some folly in the Eastern newspapers. This has arisen partly from misapprehension and partly from the management of agents and tools of the Bank. This mistake, which, reverencing the opinion of our Supreme Court, regarded the act of Ohio as a species of rebellion is evidence how dear our institutions are to our citizens. . . . The *Ohio Monitor* and *Western Herald*, two of the most spirited and respectable papers in the State, favor the cause. No paper in the State has said anything in condemnation, except the *Cincinnati Inquisitor* and the *Muskegon Messenger*."

eignty a mere name, 'full of sound and fury, signifying nothing.'"[1]

There were, however, some more conservative men in Ohio who regretted the revolutionary attitude of the State. "I view the transaction in the most odious light, and from my very soul, I detest it. I am ashamed it has happened in Ohio," said the Governor, Ethan Allen Brown. "Is it not a shoot that has sprung from the far-famed Boston opposition and matured in the foul mine of the Hartford Convention?" asked General Harrison, a candidate for State Senator from Cincinnati on an anti-Bank ticket.

The Bank, refusing to submit to such an infraction of its rights, immediately took further steps in Court; it instituted a suit against the State officials for damages;[2] at the same time it pressed its original bill for an injunction, and after a lapse of a year, in September, 1821, it secured from the Circuit Court a final decree ordering Osborn and State Treasurer Sullivan (Harper's successor) to restore the $100,000 taken with interest on $19,830 (the amount of specie in Sullivan's hands), and enjoining collection of the tax under the statute.[3] As the State Treasurer, however, refused to comply with the decree, an attachment for contempt was issued against him; he was committed

[1] Quoted in *Banking and Currency in Ohio before the Civil War* (1915), by C. C. Huntington, 320–322; *Western Herald.* See for the opposite point of view, *Cincinnati Inquisitor,* quoted in *National Intelligencer,* Oct. 11, 13, 1819.

[2] For interesting details as to this action of trespass, see *Niles Register,* XVII, Jan. 20, 1820; *Crittenden Papers MSS,* letter of Francis P. Blair to John J. Crittenden, Jan. 6, 1821, saying: "Clay is a good deal chagrined at the measures taken against the Bank. . . . The trespass case came on to be tried and excited great anxiety and curiosity among the people here. The lawyers from every part of Ohio came to hear Clay speak, but the Judges differed about the admission of certain evidence to the jury, a juror was therefore withdrawn and the cause continued, to the infinite mortification of the Legislature, who had given up their hall to the Court, and of all the rest of the folks, some of whom had come from a great distance."

[3] See *Niles Register,* XVII, Jan. 20, 1820; XIX, Oct. 7, 1820; see also *Osborn* v. *Bank of the United States,* in *Harv. Law Rev.,* (1887), I.

to prison; and under a writ of sequestration, Commissioners appointed by the Court took the key of the State Treasury from the Treasurer, entered and removed $98,000. The defendants at once appealed from the Circuit Court decree to the United States Supreme Court; and steps were taken to urge an early argument. This solution of the critical situation commended itself to conservative and patriotic men, not only in Ohio, but elsewhere. On the other hand, the radical State-Rights advocates regretted that the State should so submit herself to the Court, and pressed their opposition to the Federal Judiciary with great fervor. Their leading newspaper said in a long editorial on "Judicial Encroachments": "There is no subject, in our opinion, of such great and growing importance to the people of the United States as the conduct of the Judiciary. From the formation of the Constitution of the United States until the present time, there have been frequent contests between the Legislative power and the Courts and Judges, in almost all of which the Judges, contrary to the wishes of large majorities of the people, have succeeded in maintaining not only all the power respecting the grant of which there remained doubts, but have also arrogated to themselves an authority as well above the laws as above the Constitution itself. . . . The infallibility of the Judiciary became during Mr. Adams' Administration, *as at this time*, the test of attachment to the ruling power — proscription was the fate of all who dared to raise a doubt as to the orthodoxy of the sentiment. Virginia and Kentucky, always upon the alert when the Republic is in danger, openly opposed this alarming pretension. . . . Virginia and Ohio now occupy the ground assumed by the former State and Kentucky. . . . Both these States have to complain of

the infraction of the plain letter of the Constitution of the United States by the United States Judiciary, in cases where they have, in direct opposition to that instrument, been made parties to suits at law — and in addition Ohio has to complain of the imprisonment of the treasurer, the taking from his pockets the keys of the Treasury, whilst so imprisoned, and the entry into the Treasury, and violent seizure of moneys therein contained, the property of the State! ! ! If our sister States patiently look on and permit scenes of this kind to be acted in broad daylight, we may well despair of the republic." [1]

Meanwhile, the Legislature of Ohio had taken an active part in the controversy. Though the Governor advised that the question be allowed to take its own course in the Courts,[2] the Legislature viewed the action of the Bank in suing the State Auditor as a serious and dangerous attack on the rights of a State guaranteed by the Constitution; and on December 12, 1820, a special Joint Committee of both Houses made an elaborate report, drafted by its Chairman, Charles Hammond. In this it alleged that the suit against the State officials was clearly a suit against the State in violation of its constitutional rights, and that "to acquiesce in such an encroachment upon the privileges and authority of the State, without an effort to defend them, would be an act of treachery to the State and

[1] *Western Herald and Steubenville Gazette*, Sept. 29, 1829. Almost precisely similar views were expressed in an editorial in the *Washington Gazette*, Feb. 23, 1821.

[2] *Niles Register*, Jan. 1, 1820, referred thus to the situation: "With the light now afforded on the controversy between the State of Ohio and the Bank of the United States, no doubt can exist as to its being a simple controversy at law as between individuals, which must be settled as all other legal controversies; and that the question may be fairly tried, we hope that the State of Ohio will not pass any act, or take up any proceeding on the subject, except to authorize the appointment of counsel to maintain the rights of the State. When a legal decision is had, the State will submit, but not until then, to abandon its claims to tax any species of property within it not exempted by the Federal compact."

to all the States that compose the American Union itself." [1] Further, the Committee denied the right of the United States Supreme Court to pass upon the constitutionality of a State statute which had been upheld by the highest State Court; and after expressing its concurrence with the Kentucky-Virginia Resolutions of 1798–1799, and rejecting "the pretension of the Federal Judges" to be "the sole expositors of the Constitution", it continued: "So long as one single constitutional effort can be made to save them, the State ought not to surrender its rights to the encroaching pretensions of the Circuit Court." After considering the arguments advanced by Chief Justice Marshall for the constitutionality of the Maryland statute taxing the Bank, the Committee found that these arguments were faulty, and it advised the State of Ohio to compromise and pay back the tax, only upon the basis of the Bank's consent to withdraw from the Courts. If the Bank should refuse this, the Committee advised the passage of radical legislation depriving the Bank of all rights in the State Courts and of all protection by State officers. "The measures proposed," it said, "are peaceable and constitutional; conceived in no spirit of hostility to the government of the Union, but intended to bring fairly before the Nation, great and important questions, which must one day be discussed, and which may now be very safely investigated." This report was enthusiastically adopted by the Legislature, and a stringent statute, completely outlawing the Bank, was enacted, January 29, 1821.[2]

[1] See Report in *16th Cong., 2d Sess.* See also letter of Francis P. Blair to John J. Crittenden in *Crittenden Papers MSS*, written from Columbus, Jan. 6, 1821: "I will endeavor to forward to you a report of both houses of the Legislature. It is written by Charles S. Hammond, a leading man here. He wants honesty and dignity and has too much cunning."

[2] This statute was modified later by an Act of Feb. 2, 1821, which provided that if the Bank would withdraw its suits, remove its branches, and pay 4% of

It is interesting to note that this legislation enacted by the Democrats in Ohio withholding State support of the Federal law, almost exactly paralleled the statutes enacted by the Republican party in Ohio and other States, thirty years later, and directed against coöperation in the enforcement of the Federal Fugitive Slave Law.

In addition to this strict statute of outlawry, the Ohio Legislature passed a set of resolutions for transmission to the other States of the Union, recognizing and approving the doctrines of Kentucky and Virginia Resolutions; protesting against the doctrine of the Federal Circuit Court as violative of the Eleventh Amendment of the Constitution; asserting the right of the States to tax the premises and property of any private corporation chartered by the Congress of the United States; holding that the Bank of the United States was a private corporation, and might legally be taxed by the State; protesting against settlement of political rights of the separate sovereign States, in a suit in the Supreme Court of the United States contrived between individuals, to which the State was not a party; and instructing the Governor to transmit this report and resolution to the Legislatures of all the States and to the President of the Senate and the Speaker of the House of Representatives.[1] With this somewhat rebellious step, the State's activity against

its profits to the State ($2500 to be collected annually, until the Bank should report its actual dividends), the $90,000 seized would be returned and the provisions of the act depriving the Bank of legal protection would be annulled. On July 19, 1821, the Federal Circuit Court in Ohio at the suit of the Bank enjoined the State Auditor from levying and collecting this new $2500 tax.

[1] See *Legislative and Documentary History of the Bank of the United States* (1832), by N. St. Clair Clarke and D. A. Hall; see also *Senate Document, 16th Cong. 2d Sess.*, No. 72. A like communication was at the same time made to the House of Representatives and laid on the table; but it does not appear to have been printed by their direction; and no further action was taken. For the general sentiment of the Eastern States, see a series of twelve articles on *Ohio* v. *The Union* in the *Boston Repertory*, March 24–April 26, 1821.

the Bank ceased; and since the resolutions received indorsement from no other State except Virginia and Kentucky, and no attention whatever from the Congress of the United States, excitement over the case in Ohio gradually died away, with the return of business prosperity. When, after many delays attendant upon its argument in the Court, the case was finally decided in 1824, it had become almost wholly a dead issue.[1]

Meanwhile, the Court itself had been neither intimidated, dismayed nor deterred by the clamor raised against its decisions in cases appealed from State Courts under the Twenty-Fifth Section of the Judiciary Act; but while it continued to exercise to the fullest extent such jurisdiction in all cases properly before it on writ of error to State Courts, it was, nevertheless, exceedingly careful to avoid taking jurisdiction unless the record clearly showed a state of facts warranting its exercise. By this display of a wise caution, it avoided considerable friction with the States. An interesting illustration of this appeared in *Miller* v. *Nicholls*, 4 Wheat. 311, decided in 1819, a few days after the *McCulloch Case*. This case, which involved a serious contest between Pennsylvania and the Federal Government, had been pending in the Court for nine years without action. A writ of error to the State Supreme Court had been filed in 1809, but the State officials had disregarded it and had taken possession of the fund in controversy. One Nicholls, a United States revenue collector, had executed a mortgage to the United States on which a judgment had been obtained, and levied on, and the proceeds deposited in the State Court; later, the State had obtained a judgment,

[1] For the most accurate, thorough and discriminating account of this Ohio controversy, see *Taxation of the Second Bank of the United States* by Ernest L. Bogart, *Amer. Hist. Rev.* (1912), XVII.

based on a prior lien granted by a State statute, which it sought to collect out of the deposited funds; the United States and the State were thus brought into conflict, the United States claiming that by an Act of Congress it had a prior lien on funds of an insolvent.[1] The Court now, by Chief Justice Marshall, decided that the writ of error must be dismissed, inasmuch as (through careless pleading) the fact of insolvency had not appeared on the record, and the record did not show that any Act of Congress was applicable to the situation. The extreme desire, both of the Court and of President Monroe's Administration, to avoid conflicts between the Federal Judiciary and the State authorities was interestingly shown by this decision, as well as by the attitude of Attorney-General Wirt in this case and also in a case in Maryland, in which the Federal and the State Courts had clashed. As to the former case, Wirt's position was described by John Quincy Adams as follows:[2]

Mr. Wirt has two faults which may have an influence in the affairs of this Nation — an excessive leaning to State supremacy, and to popular humors. He asked me to negotiate an arrangement this day with the State of Pennsylvania, about a delinquent debtor, both to the United States and the State of Pennsylvania. The United States marshal took his property in execution and the Pennsylvania sheriff took it from the marshal. The question was now, he said, before the Supreme Court, and he was *afraid* the decision would be in favor of the United States. Pennsylvania was indignant at being summoned before the Court, and refused to appear. I asked him what the Department of State had to do with the affair. He did not know. As a delinquent debtor, I said, his case belonged to the Treasury Department. He replied that the Treasury could not relinquish the debt. "Nor," said I, "can the Department of State." He said if the decision should be in favor of the

[1] *Supra*, 371–374. [2] *J. Q. Adams*, IV, April 28, 1818.

United States, it would certainly stir up a dust; which, I told him, we could not help.

As to the Maryland case, involving an attempt by a State Court to replevy goods which had been seized by Federal officers for violation of the custom laws, Wirt presented his views in an official opinion as Attorney-General, in which he advised that "through respect to the authority of the State Court of Maryland, a motion be made, on the return of the writ of replevin, to quash it — as these goods are in possession of the Court of the United States and in regular course of adjudication. It is not conceivable that a Court of the State of Maryland would under these circumstances permit its process to be abused, for the purpose of raising an unconstitutional conflict with the authority of another tribunal which is in the previous possession of the subject. The collector is bound by his duty to the Court of the United States, whose officer he is *quoad hoc*, to keep the property safe to meet the final sentence of that Court. He could not, therefore, open it to the service of the writ of replevin without a violation of his duty. And no mode occurs of getting rid of the embarrassment produced by that writ, which is so effectual, and at the same time, so respectful to the State authorities, as that which I have had the honor to suggest." [1]

These two episodes well illustrate the anxiety which prevailed over the steadily increasing conflicts between Federal and State authority.

[1] Opinion of Wirt, March 22, 1819, *26th Cong., 2d Sess., House Doc.* No. 123, 189 This opinion is not published in the official *Ops. Attys.-Gen.*, I.

CHAPTER THIRTEEN

VIRGINIA AGAINST THE COURT

1821

During the year 1820, while the State of Ohio was pressing the question of State Sovereignty in connection with the Bank issue, Republicans (or Democrats as they were about to be known) both in the North and the South were becoming apprehensive as to the effect of the attitude of the Court upon the powers of the States over other subjects of State concern. The important part which it was likely to play in determining the course of vital political and economic questions was now apparent to all who realized the full scope of the doctrines announced by Marshall in the three great cases in 1819. "The encroachment already made by Judicial legislation on our State-Rights is . . . the first movement in the mighty contest between the States and the Confederacy . . . in which the States must prevail or give up their liberties forever" was the comment of one paper in 1820, referring to the decision in the *Bankruptcy Case*. Another said: "We confess that we look with infinitely more apprehension to the Judiciary than to any other department of the government. Its permanency, its *esprit de corps*, its unbounded latitude, its power, all combine to excite apprehension not only for the rights of individuals but for the rights of the States. The infringement of the rights of the States by the Judiciary is more likely to effect a consolidation of the Union than any other excuse or causes which exist." In view of the tendency, one hundred years

later, to favor a wide exercise of power by Congress and to deprecate any decision holding its Acts unconstitutional, it is interesting to note that, in 1820, it was the failure of the Court so to hold which was the source of worry to many Democrats. The support given by the Court to legislation regarded as encroachment by Congress on the States caused bitter opposition.[1] And especially did the Southern States fear the effect of the judicial doctrine of widely extended Congressional power upon the settlement of two great political issues — slavery and internal improvements. The opinion in the *McCulloch Case* had been delivered at a time when the slavery question had just become a source of vital and violent dissension in the political field. Missouri was seeking to enter the Union as a new State. The North and the East were endeavoring to make its admission conditional upon its agreement to exclude slavery from its borders. The right of Congress to impose such a condition was hotly denied by the representatives of the South. At the very time when Ohio was contesting the power of Congress to charter a bank, the great debate as to the extent of Congressional power over slavery, which finally resulted in the Missouri Compromise, was taking place during the months of January, February and March, 1820. In this hot debate, constant fears were expressed by Southern statesmen lest Marshall's broad views of the "necessary and proper" clause of the Constitution might support Congressional interference with the States on the subject

[1] *National Intelligencer*, Feb. 24, 1820; *Washington Gazette*, Feb. 20, 1821; *Independent Chronicle*, March 3, 1819. For the contrary view, however, see *Columbian Centinel*, Feb. 10, 1819, and an article on *Constitutional Law* by Warren Dutton, in *North Amer. Rev.* (Jan., 1820), X, 115: "This part of the law of the land is daily becoming more interesting, and exerting a wider influence upon the affairs of our country, from the respect that is generally felt for judicial decisions, from the intelligible form in which principles are exhibited, and from the gradual formation of a body of constitutional exposition, which will furnish precedents and analogies to future times."

of slavery. "If there is any one point on which the people of America universally agree," said Senator Barbour, of Virginia, "it is that necessity of restraining the Federal Government within the prescribed limits, to guard against encroachments on the authority of the States and thereby prevent a consolidation which has been universally considered as a synonym with monarchy." Senator Roberts of Pennsylvania said that our political salvation depended on a strict construction of the Constitution, and that "a consolidation of their extended empire must end in the worst kind of despotism." Congressman Holmes of Massachusetts said that the power claimed by Congress to restrict slavery in the new States "is not express, and if given at all it must be constructive. This amplifying power by construction is dangerous, and will, not improbably, effect the eventual destruction of the Constitution. . . . All powers not granted are prohibited, is a maxim to which we cannot too religiously adhere." "This principle of broad construction, this sweeping clause, this strong constitutional interpretation," said Congressman Johnson of Virginia, "has a strong squinting not only at monarchy but at despotism." "Every principle of policy forbids the interference on the part of Congress with the internal policy of the States," said Senator Walker of Georgia. "Collisions between the State and the Federal Government might be productive of the most unhappy consequence, such as no patriot would be willing to see. . . . If Congress persist in the determination to impose the restriction contemplated, I fear there is too much cause to apprehend that consequences fatal to the peace and harmony of this Union will be the inevitable result." [1]

On the other hand, the Federalists of the North were

[1] *16th Cong., 1st Sess.*, Jan. 19, 20, 27, Feb. 1, 4, 9, 1820.

fearful of a narrow construction of the Constitution, restricting the power of Congress over slavery in the Territories; for they considered that the prevalence of such a doctrine would place the future control of the United States in the hands of the Slave States of the South. "I feel much concern for the issue," wrote Rufus King, "which, if decided against us, settles forever the dominion of the Union. Not only the Presidency, but the Supreme Judiciary, at least a majority of its members, will forever hereafter come from the Slave region. This is as fully understood, and almost avowed, as any future purpose." [1] Another subject was also prominently to the fore in Congress at this period, which was productive of sectional division almost equal to that caused by the slavery question, and the settlement of which might also depend upon judicial decision. This was the much mooted question as to the power of Congress to appropriate money for internal improvements — canals and roads. On few subjects had there been more bitter discussion, and the division between its opponents and its advocates followed the lines of the strict or the broad construction of the Constitution. Thus the final settlement of three absorbing and important questions — the existence and powers of the Bank of the United States, the extension of slavery in the new States and the development of National internal improvements — all were felt to depend largely upon the future trend of the Supreme Court of the United States. The antagonism, therefore, to that Court was not based on dogmatic grounds or on any abstract adherence to a particular theory of constitutional law, but on a present fear of the effect of the application of a broad construction of the Constitution to the absorbing problems of the day.

[1] *King*, VI, letter to J. A. King, Feb. 6, 1820.

Three statesmen of Virginia led the attempt to awaken the people to the crisis which impended. In 1820, John Taylor of Virginia issued his famous *Construction Construed and Constitution Vindicated*, which with his *New Views of the Constitution* published in 1823, constituted for many years the political Bible of the extreme State-Rights school. "The Missouri question is probably not yet closed; the principle on which it turns is certainly not settled. Further attempts are to be made to wrest from the new States about to enter into the American Confederacy the power of regulating their own concerns. The tariff question is again to be agitated. . . . The usurpation of a Federal power over roads and canals is again to be attempted and again to be reprobated. . . . That charter (of the Bank) . . . has been justified by the Supreme Court, on principles so bold and alarming, that no man who loves the Constitution can fold his arms in apathy . . . principles calculated to give the tone to an acquiescent people, to change the whole face of our Government, and to generate a thousand measures which the framers of the Constitution never anticipated. . . . The period borrows new gloom from the apathy which seems to reign over so many of our sister States. The very sound of State-Rights is scarcely ever heard among them." In his *Tyranny Unmasked*, in 1822, Taylor denounced the judicial power, and set forth the doctrine that "whenever the Constitution operates upon collisions between individuals, it is to be construed by the Court; but when it operates upon collision between political departments, it is not to be construed by the Court."

Jefferson, from 1819 to 1823, issued constant warnings against the consolidating tendency of the Court and of Congress, which had long been to him a source of appre-

hension.[1] But it must be especially noted that his attacks on the Court did not refer to any alleged "usurpation" of the power to hold Acts of Congress unconstitutional. He was referring rather to their decisions *upholding* such Acts, and encroaching on the rights of the States. "The Judiciary of the United States," he wrote, in 1820, "is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric. They are construing our Constitution from a coördination of a general and special government to a general and supreme one alone." "The steady tenor of the Courts of the United States," he wrote again, "is to break down the constitutional barriers between the coördinate powers of the States and the Union." "I am sensible of the inroads daily making by the Federal into the jurisdiction of its coördinate associates, the State governments," he wrote early in 1821. "The Legislative and Executive branches may sometimes err, but elections and dependence will bring them to rights. The Judiciary branch is the instrument which, working like gravity, without intermission, is to press us at last into one consolidated mass. Against this, I know no one who, equally with Judge Roane himself, possesses the power and the courage to make resistance; and to him I look, and have long looked, as our strongest bulwark. If Congress fails to shield the States from dangers so palpable and imminent, the States must shield themselves, and meet the invader foot to foot." To Roane himself, he wrote, March 9, 1821: "The great object of my fear is the Federal Judiciary. That body like gravity, ever acting, with noiseless foot, and unalarming advance, gaining ground step by step, and holding what

[1] *Jefferson*, XII, letters to Nelson Feb. 7, 1820, to Holmes April 22, 1820, to Ritchie, Dec. 25, 1820, to Gallatin, Dec. 26, 1820; to Thweat, Jan. 19, 1821.

it gains, is ingulphing insidiously the special governments into the jaws of that which feeds them. . . . Let the eye of vigilance never be closed." And typical of the fears of the State-Rights advocates was an article, just at this time in the *Washington Gazette*, which said: "We have too often had occasion to regret the undefined power of the Judiciary of the United States and the disposition manifested by the Judges to extend their jurisdiction, not only to clashing and conflicting with the Judiciary of the States, but to legislating over the Legislatures of the various States." [1]

It was amid apprehensions so expressed by Jefferson and by many other statesmen, politicians and newspapers of the South and West that the great case of *Cohens* v. *Virginia*, 6 Wheat. 264, came before the Court at the 1821 Term, involving what was claimed by the State of Virginia to be an immense extension of Federal power and an infraction of the State sovereignty. Cohens had been prosecuted and found guilty in a Virginia State Court for selling a lottery ticket in Virginia, in violation of the State law forbidding such sale. The lottery was organized by the City of Washington in the District of Columbia, under a statute of Congress authorizing the city to institute lotteries. On appealing to the Supreme Court of the United States by writ of error to the Virginia Court, Cohens was met by the contentions on the part of the State — first, that the Court had no jurisdiction on a writ of error to a State Court in a State criminal prosecution; second, that Congress had no power to authorize a lottery to sell tickets in a State whose law forbade such sale. The attempted exercise of appellate jurisdiction by the Court in this case had aroused high indignation in Virginia; and the Legislature had passed resolves denying

[1] *Washington Gazette*, Feb. 20, 1821.

the existence of any such jurisdiction, and saying that the Court had "no rightful authority under the Constitution to examine and correct the judgment for which the Commonwealth has been 'cited and admonished to be and appear at the Supreme Court of the United States', and that the General Assembly do hereby enter their most solemn protest against the jurisdiction of that Court over the matter." [1] It further resolved that the counsel who were to represent the State before the Court "be limited (in sustaining the rights of the State and in the discharge of the duties required of them) alone to the question of jurisdiction; and if the jurisdiction of the Court should be sustained, that they will consider their duties at an end." [2] The *Richmond Enquirer* had vigorously indorsed this resolution, saying that it presented "one of the most important questions in the whole range of the Judiciary Department. The principle which it asserts seems to be essential to the existence and preservation of State-Rights, and the true foundation of our political system."

In accordance with instructions, the counsel for the State, Philip P. Barbour (who later became a Judge of the Court), and Alexander Smythe, on February 19, 20, 1821, when the case came before the Court on a motion to dismiss the writ of error, confined their arguments solely to the question of the right of the Court to entertain jurisdiction. "The power to revise decisions of the State Courts was not expressly given by the Constitution," said Smythe, "and can it be believed that it was meant that the greatest, the most consolidating of all the powers of the Government should pass by an unnecessary implication?" And in closing his argument, Smythe rather truculently warned the Court

[1] *Niles Register*, XX, 118, 129; *State Documents on Federal Relations* (1911), by Herman V. Ames.

[2] *Niles Register*, XIX, 211, 340, 417, Dec. 2, 1820, Jan. 20, Feb. 24, 1821.

of the desirability of preventing "clashing of Federal and State powers." "Let each operate within their respective spheres," he said, "and let each be confined to their assigned limits. We are all bound to support the Constitution. How will that be best effected? Not by claiming and exercising unacknowledged power. The strength thus obtained will prove pernicious. The confidence of the people constitutes the real strength of this government. Nothing can so much endanger it as exciting the hostility of the State governments. With them it is, to determine how long this government shall endure." For the plaintiff in error, the full power of the Court was splendidly upheld by David B. Ogden and in a masterful argument by William Pinkney: "This particular portion of the judicial power of the Union is indispensably necessary to the existence of the Union. The judicial control of the Union over State encroachments and usurpations was indispensable to the sovereignty of the Constitution — to its integrity — to its very existence. Take it away, and the Union becomes again a false and foolish confidence — a delusion and a mockery!" Supervisory power of the Federal Supreme Court, he said, was especially necessary in criminal cases in the State Courts, for it is in such cases "the sovereignty of the State — State pride — State interests — are here in paramount vigor, as inducements to error; and judicial usurpation is countenanced by legislative support and popular prejudice." [1]

Two weeks after the argument, on March 3, 1821,

[1] While the case was pending the *Washington Gazette*, Feb. 20, 1821, a strong Republican paper, printed an article on State-Rights, commenting on the *Cohens Case* and resolutions in Congress relating to it; and evidently fearing prosecution for contempt, the editor added at the end the following note: "We had the above in type before we recollected that the case alluded to was actually before the Supreme Court. Its insertion, therefore, is intended, not as a hint to that Tribunal, on which the press has no influence, but solely as an article worthy of attention from the American public at large."

Chief Justice Marshall gave the opinion of the Court.[1] "The questions presented," he said, "are of great magnitude, and may be truly said vitally to affect the Union." The counsel for the State contend, he continued, that the Court is excluded from inquiry whether the laws and Constitution of the United States have been violated by the judgment of a State Court. "They maintain that the Nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the Government is reduced to the alternative of submitting to such attempts, or of resisting them by force." "If such be the Constitution," the Chief Justice determinedly said, "it is the duty of the Court to bow with respectful submission to its provisions. If such be not the Constitution, it is equally the duty of this Court to say so, and to perform that task which the American people have assigned to the Judicial Department." Thereupon, in an opinion which became one of the chief bulwarks of American unity, the Court held that its jurisdiction under the Constitution, in all criminal cases arising in State Courts in which a Federal question was involved, was undeniable and supreme. This decision, supplementing that in *Martin* v. *Hunter*, five years before, forever settled, so far as the Court was concerned, the validity of its appellate jurisdiction over State Courts under the provisions of the Judiciary Act. Having thus denied Virginia's contention that it had no jurisdiction on the writ of error, the Court proceeded to determine the merits of the decision made by the Virginia Court. The points involved were twofold; first, whether the Act of Congress, properly con-

[1] Judge Story wrote, Feb. 28, 1821: "We have had some very interesting constitutional questions argued at this Term. The only one which has yet excited much attention is one from Virginia — it is not yet decided." *Story*, I, 397.

strued, authorized the sale of lottery tickets in States where such sale was forbidden by State law; second, whether Congress had any constitutional power to authorize such sale. Counsel for Virginia declining to take part in the argument on the merits, and it appearing that a decision of the questions would affect various other cases already arisen or about to occur in other States, the Court "deemed it necessary to hear an argument, before it pronounced judgment on the merits." On March 2, Daniel Webster argued in denial of the power of Congress and against the interpretation of the statute contended for by Cohens, arguing not as counsel employed by Virginia "but in consequence of his being counsel for the State of New York in a similar case." [1] Cohens' side was argued by David B. Ogden and William Wirt. On Monday, March 5, three days after the argument, the Court decided the case on the merits in favor of the State of Virginia, holding that Congress did not intend to authorize sale of tickets in Virginia, even if it had the power so to do.[2] The Court found it unnecessary to decide as to the power of Congress, though Marshall uttered several *dicta* which implied the existence of such a power in cases involving functions of a National nature. Thus, Virginia, though losing the case on the jurisdictional question, won it on the merits — "a singular result of their assuming an unexampled latitude

[1] See *National Intelligencer*, March 23, 1821.

[2] It is interesting to note that lotteries were involved in several cases about this time. In *Brent* v. *Davis*, 10 Wheat. 395, in 1825, involving another City of Washington lottery, the Court intimated its views of the general subject saying: "However questionable may be the policy of tolerating lotteries, there can be no question respecting the policy of removing, as far as possible, from those who are concerned in them, all temptation to fraud." In *Clarke* v. *City of Washington*, 12 Wheat. 40, in 1827, argued by Webster, Wirt and Walter Jones against Thomas Swann, the city was held liable to pay $150,000 in prizes — a decision which practically put an end to this method of paying for public improvements in Washington. See *National Intelligencer*, Jan. 31, Feb. 8, 1827; *United States Telegraph*, Feb. 5, 1827; *Niles Register*, XXVIII, 148. See also other lottery cases, *Corporation of Washington* v. *Young*, 10 Wheat. 406; *Shankland* v. *Washington*, 5 Pet. 390.

of jurisdiction," said the *Washington Gazette*. "This course, which we do not ascribe to artifice, seems the more dangerous, as it tends to lull the States into acquiescence with their assumptions." [1]

To the Republicans, the decision as to jurisdiction and the language of Marshall's opinion came now as a climax to the continual march of encroachment by the Court on the sovereignty of the States, and they seriously believed that the fundamental doctrines on which the Union was based were in grave peril of destruction.[2] "We had no manner of doubt as to the result," said *Niles Register*, "that the State sovereignty would be taught to bow to the Judiciary of the United States. So we go. It seems as if almost everything that occurs had for its tendency that which every reflecting man deprecates." The *Richmond Enquirer* spoke of the opinion, "so important in its consequences and so obnoxious in its doctrines", and said that "the very title of the case is enough to stir one's blood." It feared that "the Judiciary power, with a foot as noiseless as time and a spirit as greedy as the grave, is sweeping to their destruction the rights of the States. . . . These encroachments have increased, are increasing and ought to be diminished"; and it advocated a repeal of the fatal Section of the Judiciary Act as "the most advisable and constitutional remedy for the evil." A leading Ohio paper spoke of

[1] *Washington Gazette*, March 22, 23, 24, 1821; *National Intelligencer*, March 15, 1821; *Liberty Hall and Cincinnati Gazette*, March 21, 1821. The *Norfolk* (Va.) *Herald* said, March 31, 1821: "The high importance of the decision . . . makes it our duty to publish it in full. . . . We can assure our readers, however, that we could give them nothing better." The decision in Virginia's favor was lamented by those who favored lotteries, and the following singular criticism appeared in a letter in the *National Intelligencer*, March 14, 1821, deploring the decision: "However much this opinion of the learned Judge may accord with justice, it cannot but be regretted by every liberal and unprejudiced man. A great check is thus given to the improvement of the city," which, it was said, depended on its lotteries.

[2] *Niles Register*, XX, March 17, 1821; *Richmond Enquirer*, March 23, April 6, 1821.

"the alarming progress of the Supreme Court in subverting the Federalist principles of the Constitution and introducing on their ruins a mighty consolidated empire fitted for the sceptre of a great monarch"; and it continued: "That the whole tenor of their decisions, when State-Rights have been involved, have had a direct tendency to reduce our governors to the condition of mere provincial satraps, and that a silent acquiescence in these decisions will bring us to this lamentable result, is to us as clear as mathematical demonstration." Letters in many papers said that: "The Judges are progressively widening the sphere of their duties so as to swallow up almost every other influence in the Nation in that of the General Government. The cases of the *Town of Pawlett*, *Dartmouth College*, *Maryland and McCulloch*, and *Cohens and Virginia*, have each developed some new principle of Federal jurisdiction, not before supposed to exist. The principle of each of these cases, it may be said, sprung upon the States, without an opportunity afforded them to consider and combat the doctrines involved. They have not originated in public legislative provisions, publicly enacted, upon a theatre where public opinion can be felt, but have started up as from a lurking place, concealed under enactments made, it is conceived, for very different purposes. Among the most serious objections that I feel to the principles of these cases is that each asserts a power in the government of the Union to cherish and protect a different species of corporation. I do not believe that the framers of the Constitution intended to commit to the National Government the protection of corporate towns, colleges, banks or lottery offices. It is, nevertheless, very evident that, by attaching to the General Government all these establishments, its power and influence is greatly strengthened." "Well indeed

may our wisest and best men deprecate the strides that are made, and have been making, towards cleaving down the State Sovereignties, and erecting upon their ruins a consolidated oligarchy." [1]

The most effective and vigorous attacks upon the Cohens decision again came naturally from Virginia, and particularly from Judge Spencer Roane of the Court of Appeals. Roane had first tried to persuade James Madison to write a public criticism of the case; but the latter declined to undertake the task of "unravelling the argument applied by the Court." [2] Though concurring with Roane in his fear of the consolidating tendency of the Court, Madison disagreed with his advocacy of a repeal of the appellate power of that Court from State Courts. While the latitude of jurisdiction assumed was to be regretted, he wrote to Roane, nevertheless it was "less formidable to the reserved sovereignty of the States than the latitude of power which it has assigned to the National Legislature." But that the Supreme Court must be the final arbiter of questions arising in the States under the Federal Constitution and laws, Madison felt almost as strongly as Marshall himself. "The Gordian knot of the Constitution seems to be in the problem of collision between the Federal and State powers, especially as eventually exercised by their respective tribunals. If the knot cannot be untied by the text of the Constitution, it ought not certainly to be cut by any political Alexander," he wrote, and while the Constitution should be

[1] *Liberty Hall and Cincinnati Gazette*, April 16, 1821; later June 18, 1821, in a six-column article on the case, it said that the decisions of the Court had "given alarm. . . . Consolidation of these States is the signal of the loss of their liberties." Letters from "Hampden" in *Western Herald*, Oct. 6 to Nov. 24, 1821.

[2] *Madison*, IX, letters to Spencer Roane, May 6, June 29, 1821. For effective criticism of the doctrines of the *Cohens Case*, see *New Views of the Constitution* (1823), by John Taylor; see also *Construction Construed* (1820), by John Taylor; and John Taylor correspondence in *John P. Branch Historical Papers* (June, 1908).

construed as far as possible so as "to obviate the dilemma of a judicial rencounter or a mutual paralysis", nevertheless, "on the abstract question whether the Federal or the State decision ought to prevail, the sounder policy would yield to the claims of the former." [1] Roane, himself, accordingly, undertook the onslaught on the *Cohens Case* by two series of letters published in the *Washington Gazette* under the name of "Hampden", and in the *Richmond Enquirer* under the name of "Algernon Sidney", in April, May and June, 1821.[2] "A most monstrous and unexampled decision", he termed it. "It can only be accounted for from that

[1] Writing to Joseph G. Cabell, eight years later, Sept. 7, 1829, Madison referred to his correspondence with Roane, and said: "A political system that does not provide for a peaceable and effectual decision of all controversies arising among the parties is not a Government, but a mere Treaty between independent nations, without any resort for terminating disputes but negotiations, and that failing, the sword. . . . In the years 1819 and 1821, I had a very cordial correspondence with the author of Hampden and Algernon Sidney. . . . I was induced in my last letter to touch on the necessity of a definitive power on questions between the U. S. and the individual States, and the necessity of its being lodged in the former, where alone it could preserve the essential uniformity."

Writing to Thomas Jefferson, June 27, 1823, Madison said: "Believing as I do, that the General Convention regarded a provision within the Constitution for deciding in a peaceable and regular mode all cases arising in the course of its operation, as essential to an adequate system of government; that it intended the authority vested in the Judicial Department as a final resort in relation to the States for cases resulting to it in the exercise of its functions . . . and that this intention is expressed by the Articles declaring that the Federal Constitution and laws shall be the supreme law of the land and that the Judicial Power of the United States shall extend to all cases arising under them; believing, moreover, that this was the prevailing view of the subject when the Constitution was adopted, and put into execution; that it has so continued through the long period which has elapsed, and that even at this time an appeal to a National decision would prove that no general change has taken place: thus, believing, I have never yielded my original opinion indicated in the *Federalist*, No. 39, to the ingenious reasonings of Col. Taylor against this construction of the Constitution." *Madison*, IX.

[2] See letters of Algernon Sidney in *Richmond Enquirer*, May 25, 29, June 1, 5, 8, 18, 21, republished in many newspapers of the day, and recently in *John P. Branch Historical Papers* (June, 1906). *Niles Register* said July 7, 1821: "The decision . . . still claims the attention of some of our ablest writers, and the correctness of it is contested with a fine display of talents and profound reasoning by 'Algernon Sidney' in the *Richmond Enquirer* and 'Hampden' in the *Washington City Gazette* — to which we refer those who are not already satisfied on the subject. For ourselves, though not exactly prepared to submit, it seems as if it were required that all who do not subscribe to their belief in the infallibility of that Court are in danger of political excommunication."

love of power which all history informs us infects and corrupts all who possess it, and from which even the upright and eminent Judges are not exempt"; and he referred to the Court's extravagant pretensions" and "zenith of despotic power." He advocated a repeal of the Twenty-Fifth Section, which, he said, showed an "unwarrantable jealousy of the State Judiciaries and finds nothing to warrant it in the Constitution." These series of articles were republished in full in many Southern and Western newspapers and produced a profound effect upon the community.[1] Another virulent set of letters appeared in the *Richmond Enquirer* in May, June and July, 1821, by a writer under the pen name of "Somers", attacking the Court and its alleged political prejudice and bias and the ascendancy of the Chief Justice.[2] "The opinion must excite alarm in the mind of every man who feels any attachment to the independence of the States," he declared. "There never was an opinion which contained as many principles of vital importance to the chartered rights of a free people. The fears of some of our wisest statesmen, so loudly expressed at the adoption of the Constitution, are more fully realized; and consolidation with all its terrors comes forth under the high sanction of the Supreme Judiciary. . . . A death blow has been aimed at the very existence of the States. . . . If the independence of the States is anything but a name, a revolution has been effected in our country, and we no longer enjoy that Constitution which our fathers have given us, — a revolution not the less to be dreaded because it is accomplished without the noise of arms, or because it

[1] See the "Hampden" series from the *Washington Gazette*, republished in full by the *Western Herald* in Ohio, Oct. 6, 13, 20, 27, Nov. 3, 9, 17, 24, 1821 (the editor stating erroneously that the letters were written "by a plain and practical Republican farmer residing in the State of Ohio").

[2] See *Richmond Enquirer*, May 15, 22, June 1, 12, 19, 29, July 13, 1821.

approaches us in the insidious shape of a construction, and not in the avowed forms of usurpation. Let us consider this as a salutary warning of what they are to expect from the *impartial* tribunal of a Federal Court. . . . The Supreme Court, by the latitude of construction in which they have indulged, have rendered the Constitution the sport of legal ingenuity. No one measure has made so alarming a breach in our political institutions as this opinion." [1] Jefferson wrote to Roane, suggesting the publication of his letters in pamphlet form, and stating that he would then send them to friends in the different States, "in the hope of exciting others to attend to this case, whose stepping forward in opposition would be more auspicious than for Virginia to do it. I should expect that New York, Ohio, and perhaps Maryland might agree to bring it forward, and the two former being Anti-Missourians might recommend it to that party." [2] Writing to Nathaniel Macon, October 20, 1821, Jefferson continued to impress his views of the dangerous tendency of the Court: "Our Government is now taking so steady a course as to show by what road it will pass to destruction, to wit, by consolidation first, and then corruption, its necessary consequence. The engine of consolidation will be the Federal Judiciary, the two other branches the corrupted and corrupting instruments." To James Pleasants, he wrote, December 26, as to the "difficult task in curbing the Judiciary in their enterprises on the Constitution." After considering various other remedies, he said that a more immediate effect could be produced by a "joint protestation of both Houses of Congress that the doc-

[1] Echoes of these attacks were also heard in a few places in the Northern States, more especially in New York, where DeWitt Clinton supported the view taken by Virginia; see *Chief Justice Marshall and Virginia*, by William W. Dodd, *Amer. Hist. Rev.* (1906), XII.

[2] *Roane Correspondence*, in *John P. Branch Historical Papers* (June, 1905), letter of Jefferson to Roane, June 25, 1821.

trines of the Judges in the case of Cohens, adjudging a State amenable to their tribunal, and that Congress can authorize a corporation of the District of Columbia to pass any Act which shall have the force of law within a State, are contrary to the provisions of the Constitution of the United States. This would be effectual; as with such an avowal of Congress, no State would permit such a sentence to be carried into execution within its limits." [1] Of the methods suggested by Jefferson for the reform of the Court and its conduct, a description will be given in a subsequent chapter. Neither Jefferson's pronounced views nor his proposed remedies seemed, however, sufficiently drastic to Roane, the more radical. "The career of the High Court must be stopped or the liberties of our country are annihilated," he wrote in December, but "Jefferson and Madison hang back too much in this great crisis. Jefferson at least ought to do, in regard to republicanism and republicans, what one of the French literati did in regard to the French language. Being on his deathbed and surrounded by friends, one of them sinned against the purity of that language, whereupon the sick man corrected him with great energy. One of his friends seeming surprised that he should do this, under his extreme situation, he replied with increased energy, that he would defend the purity of the French language with his last gasp, and instantly expired." [2] In Roane's

[1] To Archibald Thweat, he wrote, Dec. 24, 1821, referring to his previous letter to William C. Jarvis, of Sept. 28, 1820, "in which letter I formally combatted his heretical doctrine that the Judiciary is the ultimate expounder and arbiter of all constitutional questions." See also letter of Jarvis to Jefferson, Oct. 16, 1820, *Jefferson Papers, Mass. Hist. Soc. Coll.* And letter of Jefferson to John Taylor, Feb. 14, 1821, *ibid.*, stating that Taylor's book on the Constitution "pulverizes the Judges on bank taxation and of the 5 lawyers on lotteries. This last act of venality (for it cannot be of judgment) makes me ashamed that I was ever a lawyer."

[2] *Roane Correspondence*, in *John P. Branch Historical Papers* (June, 1905), letters to Archibald Thweat, Dec. 11, 24, 1821. Roane wrote previously to Thweat, Dec. 11, 1821: "The Governor's patriotic message on the subject of the Supreme Court has been very well received by the republicans here, in consequence of the

view, the State of Virginia itself should act and should advocate Constitutional Amendments to curb, if not abolish, the Court. This, however, was farther than Virginia was willing to go; and though resolutions were introduced advocating these radical measures, the Virginia Legislature finally decided to take no action in the matter.[1]

Meanwhile, the Court found many defenders in the press at the North, amongst the ablest of whom was Henry Wheaton of New York, who wrote: "Very able and professional men are satisfied that the whole argument against the jurisdiction of the Supreme Court has been completely demolished in the opinion delivered by Chief Justice Marshall . . . and certainly it bears the strongest marks of his acute and enlarged mind, which when it applies itself to the interpretation of the fundamental law, soars above the ordinary element of a Judge and technical lawyer and displays the wisdom and skill of a great law-giver." [2] In the South as well, the

public mind having been somewhat prepared on the subject. But such is the apathy of the times, and the dearth of talents in the Legislature, that I doubt whether anything will be done by that body. Certainly not, I expect, unless they should be aided by some of our veteran statesmen.

[1] There was a difference of opinion "as to the expediency of a remonstrance at that time, the general mind of the State being then under extraordinary excitement by the Missouri question." . . . "But this case is not dead, it only sleepeth," wrote Jefferson to Judge William Johnson, June 12, 1823; and he further said that Roane's Algernon Sidney letters "appeared to me to pulverize every word which had been delivered by Judge Marshall of the extra-judicial part of his opinion; and all was extra-judicial except the decision that the Act of Congress had not purported to give to the corporation of Washington the authority claimed by their lottery law of controlling the laws of the States within the States themselves. The practice of Judge Marshall of travelling out of his case to prescribe what the law would be in a moot case not before the Court is very irregular and very censurable. . . . The States supposed by their Tenth Amendment, they had secured themselves against constructive powers. They were not lessoned yet by *Cohens Case*, nor aware of the slipperiness of the eels of the law." The *New York Evening Post*, Feb. 14, 1822, quoted the *New York American* as to resolutions pending in the Virginia Legislature on the *Cohens Case:* "They amount to nothing less than a serious proposition to dissolve the Republic, to introduce anarchy in the place of the beautiful order that is now established."

[2] *New York American*, May 8, 1821; *Southern Patriot*, March 31, 1821. A series of letters under the name of "Fletcher of Saltoun", in the *Richmond Enquirer*,

opinion was eloquently supported, notably by the *Southern Patriot* in Charleston, which said that: "Such illustrations of the true theory and intention of the Constitution are of the highest public utility. They reconcile the people to the exercise of a power which they are apt to view with a spirit of jealousy. . . . That branch of the opinion of the Court which regards the question of jurisdiction presents one of the best connected and most vigorous constitutional arguments that we have seen;" and a week later, it commented on the jealousy of the Court by Virginia as, "not a little remarkable", and said that that State seemed unnecessarily more sensitive on her rights than the rest of the States, that "consolidation was a chimera that haunted the imagination of those unfriendly to the Constitution at the period of its adoption", that no part of State sovereignty had ever yet been lost and that only pretensions destructive of the integrity of Federal authority had been repressed. Very wisely, it pointed out that the practice of disputing repeatedly the decisions of the Court had the effect to diminish respect for it.

The criticisms launched against his opinion were hotly resented by Chief Justice Marshall, who wrote to Judge Story that: "The opinion of the Supreme Court in the *Lottery Case* has been assaulted with a degree of virulence transcending what has appeared on any former occasion . . . but I think for coarseness and malignity of invention, Algernon Sidney surpasses all party writers who have ever made pretensions to any decency of character. There is on this subject no such thing as a free press in Virginia, and of consequence the calumnies and misrepresentations

June 22, 26, July 3, 6, 1821, assailed this *New York American* article, stating: "It is not the least alarming symptom of these tranquil times that a judicial decision which has struck a vital blow at the independence of the States has, by some, been received with adulation, and by others submitted to as oracular."

of this gentleman will remain uncontradicted and will by many be believed to be true. He will be supposed to be the champion of State-Rights, instead of being what he really is, the champion of dismemberment." Later, Marshall wrote to Story, saying: "I send you the papers containing the essays of Algernon Sidney. Their coarseness and malignity would designate the author if he was not avowed. The argument, if it may be called one, is, I think, as weak as its language is violent and prolix. . . . In support of the sound principles of the Constitution and of the Union of the States, not a pen is drawn. In Virginia, the tendency of things verges rapidly to the destruction of the government, and the reëstablishment of a league of sovereign States. I look elsewhere for safety." [1] The situation, Marshall rightly attributed largely to the influence of Thomas Jefferson, and he expressed his personal views of the latter with some acerbity: "For Mr. Jefferson's opinion as respects this department, it is not difficult to assign the cause. He is among the most ambitious, and I suspect among the most unforgiving of men. His great power is over the mass of the people, and this power is chiefly acquired by professions of democracy. Every check on the wild impulse of the moment is a check on his own power, and he is unfriendly to the source from which it flows. He looks, of course, with ill will at an independent Judiciary. That in a free country with a written Constitution any intelligent man should wish a dependent Judiciary, or should think that the Constitution is not a law for the Court as well as the Legislature, would astonish me if I had not learnt from observation

[1] See letters of June 15, July 13, Sept. 18, 1821, in *Mass. Hist. Soc. Proc., 2d Series,* XIV.

that with many men the judgment is completely controuled by the passions. The case of the mandamus may be the cloak, but the batture is recollected with still more resentment." On September 18, having heard that Hall, the editor of the *American Law Journal*, had been requested to publish the "Sidney" letters, Marshall wrote to Story, inferring that Jefferson was the instigator of such republication, and stating that Jefferson's "settled hostility to the Judicial Department will show itself in that and in every other form which he believes will conduce to its object",[1] and after giving his views as to the course the editor should pursue, Marshall concluded by prophesying that an attempt would be made in Congress to repeal the obnoxious Twenty-Fifth Section: "A deep design to convert our government into a mere league of States has taken strong hold of a powerful and violent party in Virginia. The attack upon the Judiciary is in fact an attack upon the Union. The Judicial Department is well understood to be that through which the government may be attacked most successfully, because it is without patronage, and of course without power. And it is equally well understood that every subtraction from its jurisdiction is a vital wound to the government itself. The attack upon it, therefore, is a masked battery aimed at the government itself. The whole attack, if not originating with Mr. Jefferson, is obviously approved and guided by him. It is therefore formidable in

[1] This gentleman "has several motives; and it is not among the weakest that the department would never lend itself as a tool to work for his political power. The Batture will never be forgotten. Indeed, there is some reason to believe that the essays written against the Supreme Court were, in a degree at least, stimulated by this gentleman, and that although the coarseness of the language belongs exclusively to the author, its acerbity has been increased by his communications with the great Lama of the mountains. He may therefore feel himself in some measure required to obtain its republication in some place of distinction."

other States as well as in this, and it behooves the friends of the Union to be more on the alert than they have been. An effort will certainly be made to repeal the 25th Sec. of the Judicial Act."

That Marshall's apprehensions of a move in Congress against the Court were amply justified was seen, when, in the following winter session of 1821–1822, there began a series of Congressional attacks upon the Court's powers and jurisdiction which continued for ten years (a full description of which is given in a later chapter). The Court itself, however, was not deterred from adhering to its determined stand in behalf of the supremacy of the National law, in spite of the increasing evidence of State opposition to the Judiciary; and it gave another example of its Nationalistic policy, when, in *McClung* v. *Silliman*, 6 Wheat. 598, decided only eleven days after the *Cohens Case*, it denied the right of a State Court to issue a writ of mandamus to a Federal official (the Register of the Government Land Office). This case again evoked criticism, due to the language of Judge Johnson (himself a Republican) in the opening words of his opinion: "This case presents no ordinary group of legal questions. They present a striking specimen of the involutions which ingenuity may cast about legal rights, and an instance of the growing pretensions of some of the State Courts over the exercise of the powers of the General Government." Referring to this comment, a writer in the *Richmond Enquirer* sarcastically asked a few months later: "After the Supreme Court of the United States had asserted through the lips of the Chief Justice its right of jurisdiction over a State in the case of *Cohens* v. *The State of Virginia* — which of the Judges was it who, on *another* occasion, spoke with a sort of sneer of *that* case

being a new evidence of the growing pretensions of these State Governments? Was this Judge one of those who formerly passed for a Republican? Was he raised to the Bench by Thomas Jefferson on account of his reputed attachment to the principles of '98 and '99? Was it for him to venture this contemptuous kick at the 'sick lion'?"[1]

An echo of the Cohens decision was heard in Congress, the next year, when a seemingly harmless bill to incorporate the United States Naval Fraternal Association, for relief of families of deceased naval officers, was defeated, through fear that the Supreme Court would construe too broadly the power of Congress to authorize such a corporation to operate within the States.[2] Archer of Virginia stated that: "It was not the arbitrary or even despotical authority asserted over the District which was contested, but the competency to pervert it to a coextensive authority over the Union." Jefferson's resentment persisted, as shown by a letter, in 1822, stating that he "reads with comfort everything which reprobates the apostatizing heresies of the case of Cohens. According to the doctrines of the Supreme Court in that case, the States are provinces of the Empire, and a late pamphlet gives to that Court the infallibility of the Pope. Caesar then has only to send out his Proconsuls and with the *Sanction of our Pope* all is settled, but the battle of Bunkers hill was not fought to set up a Pope."[3]

[1] See *Richmond Enquirer*, July 27, Aug. 7, 14, 17, 31, Sept. 4, 25, 1821.

[2] *17th Cong., 2d Sess.*, Dec. 20, 1822, Jan. 6, 7, 8, 1823.

[3] Jefferson to Benjamin Ruggles, May 3, 1822, *Jefferson Papers MSS.* For interesting speeches on the 25th Section of the Judiciary Act, *pro* and *con*, and the decision in *Cohens* v. *Virginia*, see Pendleton of New York and Foster of Georgia, in the House, May 28, June 11, 1832, *22d Cong., 1st Sess.*, 3105, 3400.

CHAPTER FOURTEEN

INTERNATIONAL LAW

1816–1822

WHILE during these seven years, from 1816 to 1822, the Court was laying deep the foundations of American constitutional law, it was at the same time becoming a potent factor in the history of the foreign relations of the country, by reason of the firmness with which it insisted on the strictest fidelity of the United States to the provisions of treaties, and on the honest observance by neutrals of their international duties.[1] And the large number of cases involving international and prize law, which were decided at the 1822 Term, afforded striking proof of the importance of this phase of the Court's work. At the very outset of the Term, the development of international law, however, sustained a severe loss in the sudden death of the most eminent advocate in that branch of law — William Pinkney.[2] "We all lament the death of Mr. Pinkney as a loss to the profession generally, and most especially to that part of it which is assembled in this room. We lament it too as a loss to our country," said Chief Justice Mar-

[1] Marshall wrote to Rufus King, May 5, 1802: "The National tribunal, I hope, will continue to manifest in the exposition of the treaty of peace that share of prudence which is required by justice and which can alone preserve the reputation of the Nation." *King*, III; see *The Part taken by Courts of Justice in the Development of International Law*, by Simeon E. Baldwin, *Yale Law Journ.* (1900), X.

[2] Pinkney died, Feb. 25, 1822, from apoplexy brought on by overwork in the argument of *Ricard* v. *Williams*, 7 Wheat. 59. Rufus Choate wrote: "I heard his last great argument, when, by his overwork, he snapped the cord of his life. His diction was splendidly rich, copious, and flowing. Webster followed him, but I could not help thinking he was infinitely dry, barren and jejune." *Reminiscences of Rufus Choate* (1860), by Edward G. Parker.

shall, when the Court paid the very unusual tribute of adjourning on the news of Pinkney's death;[1] and his contemporaries at the Bar did not stint their recognition of Pinkney's supreme leadership. "He died literally in harness. . . . The void will never be filled that he has left," wrote John Randolph.[2] "It seems undisputed that he was deservedly the head of the Bar," wrote Rufus King. "Some days ago, speaking of himself, he said that he found he was obliged to give more time and labour to his profession than formerly, that he considered himself at the head of the Bar, and being resolved to continue so, he found it necessary to be most diligent and laborious, in preparing himself to appear before the Court."[3] William Wirt wrote: "Poor Pinkney, he died opportunely for his fame. It could not have risen higher. . . . He was a great man. On a set occasion, the greatest, I think, at our Bar. . . . He was an excellent lawyer; had very great force of mind, great compass, nice discrimination; strong and accurate judgment; and for copiousness and beauty of diction was unrivalled. He is a real loss to the Bar."[4] And Pinkney's devoted admirer, Judge Story, wrote: "His genius and eloquence were so lofty, I might almost

[1] The following entry was ordered to be made on the minutes of the Court (7 Wheaton, v): "The Court being informed that Mr. Pinkney, a gentleman of the Bar, highly distinguished for his learning and his talents, departed this life last night in this city, the Judges have determined, as a mark of their profound respect for his character, and sincere grief for his loss, to wear crape on the left arm for the residue of the Term; and to adjourn for the purpose of paying the last tribute to his remains, by attending them from the place of his death." While the Court was at this time accustomed to wear crape in memory of its deceased Judges, this was the first time, so far as it appears, when they did so in honor of a member of the Bar.

[2] *Life of John Randolph* (1851), by Hugh A. Garland, II, 170.

[3] *King*, VI, letter of Feb. 26, 1822. In 8 Cranch (1812–1813), of the forty-six cases in which names of counsel are given, Pinkney argued in exactly one half. For most striking instances of the reliance placed on Pinkney by other counsel at the Bar, see interesting unpublished letters of Wirt to L. E. Stanboch, March 16, April 7, 1820, regarding the arguments of *The Amiable Isabella*, 6 Wheat. 1, in *Wirt Papers MSS.*

[4] *Wirt*, II, letters of Oct. 13, 1818, May 9, 1822.

say so unrivalled, his learning so extensive, his ambition so elevated, his political and constitutional principles so truly just and pure, his weight in the public councils so decisive, his character at the Bar so peerless and commanding, that there seems now left a dismal and perplexing vacancy. His foibles and faults were so trifling or excusable in comparison with his greatness, that they are at once forgotten and forgiven with his deposit in the grave. His great talents are now universally acknowledged." [1] "The lamented demise of Mr. Pinkney," said the *National Intelligencer*, "has left so large a space at the Bar of the Supreme Court that it will probably induce many distant gentlemen of the profession to attend the Terms of the Court regularly, who have heretofore attended only occasionally." [2]

While Pinkney's fame had been enhanced by his great constitutional arguments, it was on the development of international law that he had left his deepest impress. For this branch of practice was little known to the profession in general,[3] and it was largely by the aid of arguments of great counsel like Pinkney, Wirt, Webster, Joseph Hopkinson, Samuel Dexter, John Sergeant, David B. Ogden, Henry Wheaton and William H. Winder that Marshall and Story were enabled to create and embody in a masterly series of opinions that distinctively American conception of international, prize and admiralty law, which developed during these years

[1] *Story*, I, 415, Feb. 28, 1822. A contemporary wrote in the *North American Review*, XXIV: "To the time of his last appearance in Washington, the Court-room was always thronged with the wise, the learned, and the fashionable, when it was known that he was to speak; and he uniformly riveted the attention of his auditors through the technical details of his longest and dryest arguments."

[2] *National Intelligencer*, March 23, 1822.

[3] In 1817, in *The Dos Hermanos*, 2 Wheat. 77: "The Court cannot but watch with considerable solicitude irregularities which so seriously impair the simplicity of prize proceedings and the rights and duties of the parties. Some apology for them may be found in the fact that from our having been long at peace, no opportunity was afforded to learn the correct practice in prize causes. But that apology no longer exists."

between 1815 and 1822.[1] Since European treatises on this branch of the law were mostly antiquated, and since Lord Stowell's famous decisions in England were so tinged by the illegal attitude of the English Government in the Napoleonic wars that they failed to represent the true state of the law and could not be consistently followed in this country, it became necessary for the American Courts to formulate doctrines of international law which should more fairly express the rights and duties of neutrals and of belligerents.[2] As long ago as 1807, Marshall had written to District Judge Peters, congratulating him on publishing his admiralty decisions.[3] "If a great system of public law is ever to prevail on the ocean," he said, "it must, in analogy to the municipal system, result from decisions and reasonings, appealing through the press to the common judgment of the civilized world. Heretofore, admiralty proceedings have been concluded with too little publicity, and without disclosing the privileges on which they were founded. Naturally, they have been sub-

[1] It is interesting to note how many of the great lawyers made their first appearance in the Court in prize cases. Thus, Pinkney's first appearance was in 1806 in a case involving capture of a cargo, *Manella* v. *Barry*, 3 Cranch, 415; Hopkinson appeared first in 1807 in a prize case, *Rhinelander* v. *Insurance Company of Pennsylvania*, 4 Cranch, 29; Sergeant in 1816 in *The Aurora*, 1 Wheat. 96; Wheaton in 1816, in *The Antonia Johanna*, 1 Wheat. 159; Wirt (after one case in 1816) appeared in 1817 in *The Fortuna*, 2 Wheat. 161; Webster made his first appearance in 1814 in *The St. Lawrence*, and *The Grotius*, 8 Cranch, 434, 456.

[2] John Jay wrote to Trumbull, as to the English Admiralty at an earlier date, Oct. 27, 1797: "The delays of the Court of Admiralty do not surprise me. I have no faith in any British Court of Admiralty, though I have the greatest respect for and confidence in their Courts of *justice*, in the number of which those Courts do not deserve to be ranked (I do not extend this stricture to the Lords of Appeal)." *Life of John Jay* (1833), by William Jay, II, 283. John Quincy Adams wrote to Rufus King, Oct. 3, 1796: "The maritime law of nations recognized in Great Britain is all comprised in one line of a popular song, 'Rule, Britannia! Britannia rule the waves!' I never could find that their Admiralty Courts were governed by any other code." *J. Q. Adams Writings*, II, 33; and in his *Memoirs*, Adams wrote Dec. 19, 1827: "Cannon law is the law of Great Britain. . . . Belligerent, she tramples upon neutral rights; neutral, she maintains them at the cannon's mouth."

[3] *Peters Papers MSS*, letter to Peters, Sept. 5, 1807.

stituting for principles the capricious man ates of power and of belligerent policy. . . . It seems to be peculiarly necessary, therefore, that neutral tribunals should be heard on subjects in which neutral nations are equally concerned. . . . A general practice pursuing your example will not be without a beneficial influence on the conduct of nations on the high seas." [1] And twelve years later, Judge Story, writing to Lord Stowell in 1819, described the difficulties under which the Court labored: "The admiralty law was in a great measure a new system to us; and we had to grope our way as well as we could by the feeble and indistinct lights which glimmered through allusions incidentally made to the known rules and proceedings of an ancient Court. . . . I hope that a foundation has now been laid, upon which my successors in America may be able to build with more ease and security than fell to my lot." [2]

The conflicting rights of belligerents and of neutrals presented, during this period in the Court's history, a peculiarly difficult problem. So far as the Court dealt with cases involving the protection of the *rights* of neutrals, it cannot be said to have solved the questions with entire satisfaction (nor indeed have Courts of the present day); for as was tersely stated by Judge Johnson in the *Atalanta*, 3 Wheat. 409: "We find the law of nations embarrassed with the principle that it is lawful

[1] In 1815, in *Thirty Hogshead of Sugar* v. *Boyle*, 9 Cranch, 191, argued by Harper against Pinkney, Marshall laid down the American principle as to the authority of legal decisions on international law.

[2] *Story*, I, 318, letter of Jan. 14, 1819. The two long notes on the principles and practice in prize causes inserted (anonymously) at the end of the first and second volumes of *Wheaton's Reports* were written by Story, and remain today the basis of prize law in the United States. Story had written to N. Williams, Aug. 24, 1812: "I have been industriously reading Prize Law and have digested into my commonplace books everything I could find. . . . I hope the Supreme Court will have an opportunity to enter largely into its jurisdiction both as an Instance and a Prize Court." *Ibid.*, 228.

to impose a direct restraint upon the industry and enterprise of a neutral, in order to produce an incidental embarrassment to an enemy. In its original restricted application, this principle was of undoubted correctness and did little injury; but in the modern extended use which has been made of it, we see an exemplification of the difficulty of restraining a belligerent in the application of a convenient principle." On the other hand, the enforcement of the *obligations* of neutrals was a problem with which the Court dealt masterfully and effectively, and in such a way as to affect materially the foreign relations of the country. For many years, it became one of the most potent factors in preserving peaceful relations between the United States and Spain and Portugal, amid the serious complications which had arisen out of the revolutions of the Spanish and Portuguese colonies in Central and South America. From the outset of these revolutions, constant violations of neutrality had taken place with reference to the revolting South American States; and it is unquestionably true that conditions in this respect were intolerable.[1] As has been vividly said: "Ship after ship, armed and equipped for fighting, cleared from the customhouses at Baltimore and New Orleans as merchantmen, and after touching at some port specified in the papers, would hoist the flag of New Granada or the United States of Mexico and begin to rob, plunder and destroy the commerce of Spain. Some, without going through the form of entering the port for which they had cleared, would throw off their merchant character, the moment they were on the high seas, would mount their guns, raise their flag and prey on the commerce of a nation at amity with the United States. In other instances,

[1] *Amer. State Papers, For. Rel.*, IV, 422, letter of De Onis, Minister of Spain, to Secretary of State, Dec. 30, 1815; *History of the People of the United States*, by John Bach McMaster, IV, 372 *et seq.*

ships from the revolted provinces, with the flags of their governments at their mast-heads, would enter our ports and buy guns, powder and food, enlist men for the armies, and even take on board as passengers citizens of the United States who were to serve in the army of the insurgents. In other cases, blank commissions to act as privateers were sent to vessels in American ports, which were then equipped and manned, the blanks filled in, and the ships set sail to attack Spanish commerce, without ever having been near a port of the Colony issuing the commission." From 1808 to 1815, diplomatic intercourse between the United States and Spain had been broken off (for reasons disconnected with South American conditions); but as soon as it was resumed, Spain, with much reason on its side, demanded that the United States should put an end to the constant violations of neutrality. Congress and the President recognized the National duty to comply with the obligations imposed by international law; and a statute enacted in 1817 strengthened the old Neutrality Law of 1794, especially by amending it so as to prevent the fitting out of vessels in our ports with intent to be employed in the service of "any colony, district or people" (the former Law referring only to service of a "foreign prince or state"). This legislation, however, was not enacted without difficulty; for the South and West were hotly opposed, being mindful of the antagonistic attitude held by Spain in earlier days with reference to the opening of the Mississippi River and the disputes over the boundary of the Louisiana Territory. Spanish spoliations on our own commerce also had not been forgotten. Moreover, owing to the widespread sympathy for the South American Colonies in their effort to achieve independence, laws like the Neutrality Act, which might impede their success, were

felt to be unAmerican; and even after the Act passed there was a strong pressure for its repeal.[1] The opportunities for great financial profits in the sending out of these privateers also proved such an inducement to merchants and adventurers to violate the law that the most determined efforts by the President and by the Judiciary to enforce international obligations of the United States became imperative. As Judge Washington well said, in a charge to the Grand Jury in 1817: "It is to be hoped that the strength of the Executive arm (for the President is vested with very extensive powers to prevent the perpetration of the offences above described) and the vigilance of the customhouse officers, with the coöperation of the judicial authorities, aided by the patriotism of all well-disposed citizens, will release our country from the unmerited stigma of secretly taking part in a war which our Government is unwilling to countenance. I know that plausible pretexts are not wanting to palliate these lawless acts, and even to render them popular, with those who regard rather the avowed, than the real motive of the perpetrators of them. The emancipation of an oppressed people is urged as an excuse for these military expeditions. . . . A wilful violation of these laws can never find an excuse in the motive which induced it, however we might approve the motive, were the laws silent on the subject. I must, nevertheless, be permitted to suspect the sincerity of the motive which is professed in these cases. Search to the bottom, and it will be found to originate in self-interest, in a cupidity for that wealth which is torn by power from the hands of its defenceless owners." [2] Since the coun-

[1] John Quincy Adams in his *Memoirs*, IV, records, March 17, 1818: "Mr. Clay pushes for repeal of the laws which trammel the means of giving aid to the South American revolutionists."

[2] *Niles Register*, XIII, Nov. 8, 1817. See also *Monroe*, VI, letters of Aug. 3, and Sept. 4, 1820, as to neutrality and the duty to enforce the laws.

try at large was not in sympathy with the enforcement of its international duty, it became peculiarly incumbent upon the Courts, and especially the Supreme Court, to enforce the law with strictness; for both the honor of the United States and the preservation of its peace with Spain were at stake. Accordingly, in a long series of cases extending from 1816 to 1825, and presenting the greatest variety of facts, the Supreme Court reaffirmed its well-established doctrine that the taking of a prize by a ship fitted out or acting in violation of the neutrality of the United States would be held invalid by our Courts, and restitution of the prize so taken decreed. By its decisions, ship after ship belonging to Spanish or Portuguese owners was ordered restored, when captured by privateers from Venezuela, or the Argentine Republic, or Carthagena, which had been fitted out or unlawfully manned or equipped in American ports, or which brought their prizes into American ports in violation of law.[1]

Of this series of cases, the most famous was that of *The Santissima Trinidad*, 7 Wheat. 283, argued at great length by David B. Ogden and William H. Winder, against Daniel Webster and Littleton Waller Tazewell, and decided at the 1822 Term. Four questions were presented: first, whether the captor ship was a public ship of the United Provinces of Rio de la Plata, and the Court, through Judge Story, found that she was such a public ship; second, whether the dispatch of a vessel equipped for war but sent to Buenos Ayres as a commercial adventure was a violation of our neutrality.

[1] See *Divina Pastora*, 4 Wheat. 52; *Estrella*, 4 Wheat. 298; *Nuestra Signora de la Caridad*, 4 Wheat. 497; *Amistad de la Rues*, 5 Wheat. 385; *Josefa Segunda*, 5 Wheat. 338; *Bello Corunnes*, 6 Wheat. 152; *Nueva Anna*, 6 Wheat. 193; *La Concepcion*, 6 Wheat. 235; *Gran Para*, 7 Wheat. 471; *Santa Maria*, 7 Wheat. 490; *Arrogante Barcelona*, 7 Wheat. 496; *Monte Allegre*, 7 Wheat. 520, s.c., 9 Wheat. 616; s.c., 11 Wheat. 429, see *Writings of James Monroe* (1898), VI, letter of June 26, 1820; *La Nereyda*, 8 Wheat. 108; *The Fanny*, 9 Wheat. 658.

Judge Story held that: "There is nothing in our laws, or in the law of nations, that forbids our citizens from sending armed vessels, as well as munitions of war, to foreign ports for sale. It is a commercial venture which no nation is bound to prohibit, and which only exposes the persons engaged in it to the penalty of confiscation." The third point was whether, in case of a capture made by a public ship whose crew had been augmented in our ports, in violation of our neutrality, goods so captured and brought into our ports should be restored to their former owner. It was held that such augmentation, being a violation of our neutrality, "infects the captures subsequently made, with the character of torts, and justifies and requires a restitution to the parties who have been injured by such misconduct. It does not lie in the mouth of wrong-doers, to set up a title derived from a violation of our neutrality." The doctrine was held to apply as well to captures by public ships as by private ships, and it was further held that, though the property had been condemned in prize proceedings in Buenos Ayres, nevertheless, being in custody of our Courts and litigated here, a foreign Prize Court could not by its adjudication take away jurisdiction, or forestall and defeat the judgment of the Courts of this country. The final decision was in favor of Webster's clients; and his argument had done much to convince the Bar that international law had found in him as its advocate the fit successor to Pinkney.[1] "Tazewell and Webster have been reaping laurels in the Supreme Court, and I have been — sighing," wrote William Wirt. "North of the Potomac, I believe

[1] Hugh B. Grigsby in his *Discourse on the Life and Character of Littleton Weller Tazewell* (1860), 43–45, says that it was Tazewell who had suggested that Webster be engaged as his associate counsel. "He ever held the abilities of Mr. Webster in the highest respect, and when asked on reaching Norfolk after the argument what he thought of Webster he said . . . he 'was excessively clever but a lazy dog.'

to a man, they yield the palm to Webster; South to Tazewell." [1]

Upon the strained relations existing between Spain and Portugal and the United States at this time, the Court further poured judicial balm, by a series of decisions clarifying and enforcing the law as to piracy. While the problems as to rights and obligations of neutrality could arise only where Governments were involved whose independence or belligerency had been recognized by the United States, and while such recognition had been given by the United States to many of the Spanish revolting Colonies, there were other revolutionary movements in Mexico and South America which had not attained such a status as to warrant recognition.[2] Moreover, owing to the general disturbed conditions in the Western Hemisphere and to the temptations for pecuniary gain, marauding on the sea conducted by persons sailing under no recognized flag, by mutineers, and by private adventurers from ports of the United States, had become deplorably common during the years 1817 to 1822. Such acts constituted nothing but piracy; and again Spain made violent protests to the United States Government against the toleration shown here towards such illegal acts. The conditions were described by Judge Story in an address to the Grand Jury in 1820: "This offense (piracy) has in former times crimsoned the ocean with much innocent blood, and in its present alarming progress threatens the most serious mischiefs to our peaceful commerce. It cannot be disguised, that at the present time there are hordes of needy adventurers prowling upon the

[1] John Randolph wrote: "Tazewell is second to no other man that ever breathed; but he has taken almost as much pains to hide this light under a bushel as Pinkney did to set his on a hill. He and the Great Lord Chief are in that, *par-nobile;* but Tazewell in point of reputation is far beyond Pinkney and Marshall." *Wirt*, II, 137.

[2] See *Moore's International Law Digest*, I, 67–96.

ocean, who, under the specious pretext of being in the service of the Patriot Governments of South America commit the foulest outrages. Being united together by no common tie but the love of plunder, they assume from time to time the flag of any nation, which may best favor their immediate projects; and depredate, with indiscriminate ferocity, upon the commerce of the neutral world, regardless of the principles of law and dictates of justice." "The practice is so obvious and dishonorable to the United States, as well as pernicious in its consequences, that it must be suppressed," wrote President Monroe to John Quincy Adams, then Secretary of State.[1] *Niles Register* asked: "When is this miserable business — this wretched privateering piracy, which so much corrupts the morals of sea-faring men and leads them into every excess, terminating so often in murder and punishment by the executioner, to end? The 'patriot' service as of late fitted for in some ports of the United States is a disgrace to the country, but unhappily it has been so managed in general as to elude our laws intended for its suppression." Thomas Jefferson wrote to the Portuguese Minister: "The late piratical depredations which your commerce has suffered, as well as ours, and that of other nations, seems to have been committed by renegado rovers of several nations, French, English, Americans, which they, as well as we, have not been careful enough to

[1] *Monroe*, letters of June 26, July 24, 1820; *Jefferson*, XII, letter to Correa, Oct. 24, 1820; *Niles Register*, XVI, XVII, XVIII, *passim* in 1819–20. See also letter from George McNeill, in Baltimore, to Thomas Ruffin, July 8, 1819; *Papers of Thomas Ruffin* (1918). "There is much distress here, but it is confined chiefly to adventuring and not to the regular merchants, but the whole community is more or less affected by them — they are of three classes — 1st, speculators in U. S. Banks; 2d, pirates, called South American or patriot privateers; 3d, traders in the African Slave trade in connection with the privateers. That infamous trafficking and plundering has been carried on to a great extent — most of the parties are now, however, reaping part of their reward, infamy and ruin stares them in the face; they disgrace the whole country and the laws should be so amended as not to be evaded with impunity."

suppress. I hope our Congress . . . will strengthen the measures of suppression. Of their disposition to do it, there can be no doubt; for all men of moral principle must be shocked at these atrocities."

At first, the lower Courts were inclined to rule the law in favor of the pirates; and an illuminating description of the situation is given by Adams in his diary (though allowance must be made for his well-known bitter personal prejudices):

March 29, 1819: The misfortune is not only that this abomination has spread over a large portion of the merchants and of the population of Baltimore, but that it has infected almost every officer of the United States in the place. They are fanatics for the South American cause. The District Judge, Houston, and the Circuit Judge, Duval, are both feeble, inefficient men, over whom William Pinkney, employed by all the pirates as their counsel, domineers like a slave driver over his negroes.

May 26, 1819: I spoke to Wirt about the acquittal at Baltimore of the pirate Daniels. The case went off upon a legal quibble. Wirt says it is because the judges are two weak, though very good, old men who suffer themselves to be bullied and browbeaten by Pinkney.

August 21, 1819: Pinkney is the standing counsel for all the pirates who, by browbeating and domineering over the Courts, and by paltry pettifogging law-quibbles, has saved all their necks from the richly merited halter. . . . Baltimore, upon privateering and banking, is rotten to the heart.

Violent attacks were made against the United States District Judges in Baltimore and Charleston by diplomatic representatives of Spain and Portugal, which, though possibly justifiable, were resented by President Monroe, who wrote to Adams: "I do not recollect any previous example of an attack on the integrity, as this seems to be, of the Judiciary of any power, by a foreign

minister." [1] Fortunately, the Supreme Court now again played a great part in allaying the heated feelings of Spain and Portugal, by a series of decisions, in 1820, laying down the law as to piracy with great rigidity. The question had come before the Supreme Court for the first time in 1818, in *United States* v. *Palmer*, 3 Wheat. 610, in which case, the acts alleged to be piracy had been committed by persons who were not American citizens and who were in service of one of the acknowledged revolutionary governments and while on a ship of that government. The Court held that the Piracy Act of 1790 punishing robbery committed by "any person or persons on the high seas", was not intended to apply to other than American citizens; and it said that: "These questions which respect the rights of a part of a foreign empire which asserts and is contending for its independence, and the conduct which must be observed by the Courts of the Union towards the subjects of such section of an empire who may be brought before the tribunals of this country are equally delicate and difficult. . . . Such questions are generally rather political than legal in their character.[2] To cure this decision, Congress passed an Act, March 3, 1819, punishing piracy committed by "any person or persons whatsoever", if such persons were afterwards found in the United States. But the Court, the next year, 1820, made it clear in *United States* v. *Klintock*, 5 Wheat.

[1] *J. Q. Adams Writings*, VII, letters of Adams to Monroe, Aug. 21, 1820, Monroe to Adams, Sept. 4, 11, 1820, Adams to Correa, Sept. 30, 1820.

[2] The decision was savagely attacked by Adams, who recorded his opinion of it in his *Memoirs*, May 11, 1819: "The Supreme Court of the United States by a decision founded upon captious subtleties, in *Palmer's Case*, cast away the jurisdiction which a law of Congress had given . . . construing the words 'any person or persons' to mean only citizens of the United States. Their reasoning is a sample of judicial logic, disingenuous, false, and hollow — a logic so abhorrent to my nature, that it gave me an early disgust to the practice of the law, and led me to the inalterable determination never to accept a judicial office. In this case, if human language means anything, Congress had made general piracy by whomsoever and wheresoever committed upon the high seas, cognizable by the Circuit Courts."

144, that the scope of its previous decision had been misunderstood, and that a citizen of the United States, sailing in a ship under the flag of an unacknowledged revolutionary government (in this case under the flag of the "Brigadier of the Mexican Republic, a republic of whose existence we know nothing, or as Generalissimo of the Floridas, a province in the possession of Spain"), and attacking a Spanish vessel, could be properly convicted as a pirate under the settled doctrines of international law.[1] At the same time, the convictions of about fifty men, sentenced to death for piracy, at Boston, Baltimore, Richmond, Charleston and New Orleans, came before the Court; and in a series of nine cases, *United States* v. *Smith*, 5 Wheat. 153; *United States* v. *The Pirates*, 5 Wheat. 184, there were laid down principles of law which dealt a death blow to this form of crime in the United States. The cases were presented on certificates from the Judges of the Circuit Courts on a division of opinion. As the defendants had no counsel, the Court initiated a somewhat novel practice, by directing Daniel Webster to appear in their behalf. The Attorney-General, Wirt, opened the case, February 14, 1820, for the United States, and as stated by the *National Intelligencer:* "Mr. Webster, having been directed by the Court to argue for the prisoners, took notes for the purpose of replying on some future day to the Attorney-General." Webster made his argument a week later, February 21; and within a few days afterwards (February 25 and March 1) the Court, in opinions by Judge Story and Judge Johnson, affirmed all the convictions. Following these decisions, many of the defendants were later executed, and piracy became a rare crime.[2]

[1] See *Moore's International Law Digest*, II, 454–464.

[2] John Quincy Adams in his *Memoirs* March 13, 1820, notes that at a Cabinet Meeting called to consider the question of the fate of the convicted pirates, "it

In the maintenance of the foreign relations of the United States on a high and honorable level, and in the preservation of peace, no decisions of the Court have played a more important part than have those in which, from the outset of its history, it has upheld with the utmost scrupulousness the sanctity of treaties and their strict construction, regardless of the contentions of the Administration which happened to be in power. In no case was its attitude in this respect more vividly illustrated than in *The Amiable Isabella*, 6 Wheat. 1, which was decided in 1820, and which again involved the extremely strained relations then existing between Spain and the United States. The claimant in this case had urged that the facts brought it within the provisions of the Spanish Treaty of 1795 embodying the doctrine of "free ships, free goods." Pinkney had argued for the Government, on the other hand, that though the treaty did not specifically except cases of fraud, the Court must so construe it, and he eloquently urged the serious consequence which might flow from the adoption of the opposite construction. "The only mode of preserving amicable relations between the two powers," he said, "is by judicial interposition, preventing the effect of such violations of the spirit of the treaty, before they grow too mighty to be controlled by diplomatic remonstrances." To this plea, however, Judge Story (while construing the treaty on another ground in favor of the Government) replied that the case embraced "the interpretation of a treaty which we are bound to observe with the most scrupulous good faith, and which our Government could not violate without disgrace, and

was agreed that Mr. Wirt, the Attorney-General, should see Chief Justice Marshall and enquire of him where the severity of the law and where the beneficence of humanity may best be dispensed"; and that, on March 31, 1820, the President decided to have two persons executed at each place where convictions had been obtained — Boston, Baltimore, Richmond, Charleston and New Orleans.

which this Court could not disregard without betraying its duty." And the Court, he continued, could "look to consequences no further than the sound principles of interpretation and international justice require." And Judge Johnson (though construing the treaty differently) was equally vigorous in upholding the scrupulous execution of the treaty provisions, uninfluenced by "the pressure or allurement of present circumstances", and in expressing the view that "considerations of policy or the views of the Administration are wholly out of the question in this Court. What is the just construction of the treaty, is the only question here. And whether it chimes in with the views of the Government or not, this individual is entitled to the benefit of that construction." And in the following noble words, he set forth the doctrine by which the Court has always been guided in regard to treaties: "Where no coercive power exists for compelling the observance of contracts but the force of arms, honor and liberality are the only bonds of union between the contracting parties, and all minor considerations are to be sacrificed to the great interests of mankind. . . . The execution of one treaty in a spirit of liberality and good faith is a higher interest than all the predatory claims of a fleet of privateers."

Four years later, the Court aided in the maintenance of friendly relations with another foreign nation, through a decision against the Government in the case of *The Apollon*, 9 Wheat. 362, in 1824. Much friction had arisen between France and the United States during President Monroe's term, and a tonnage duty had been imposed by Congress in 1820 on all French vessels entering our ports. The French ship involved in this case, having sailed up the St. Mary's River to land goods in Spanish territory across our boundary, as a

convenient depot for illicit trade with the United States, had been seized in Spanish waters by our custom authorities. The case was argued warmly by Attorney-General Wirt, against Henry Clay and Harper. The Court, through Judge Story, held the seizure "wholly without justification under our laws"; and it again refused to pay heed to the political considerations advanced in arguments in behalf of the United States, saying:

> The questions arising upon the record have been argued with great zeal and ability, and embrace some considerations which belong more properly to another department of the government. It cannot, however, escape observation, that this Court has a plain path of duty marked out for it, and that is, to administer the law as it finds it. We cannot enter into political considerations, or the authority of the Government to defend its rights against the frauds meditated by foreigners against our revenue system, through the instrumentality and protection of a foreign sovereignty. . . . We must administer the laws as they exist, without straining them to reach public mischiefs which they were never designed to remedy. It may be fit and proper for the government, in the exercise of the high discretion confided to the Executive for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. . . . But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands that the injured party should receive a suitable redress.

The political situation relative to the approaching nomination of Presidential candidates was clearly reflected in the argument, as Henry Clay took occasion to animadvert severely on the conduct of his rival for the Presidency, John Quincy Adams, who was then Secretary of State. "The Supreme Court seems for a time to have borrowed from the legislative bodies some of the peculiarities of their debates," wrote a New York correspondent, "and the case of *The Apollon*,

the argument of which was concluded yesterday, has afforded a wide field for the copious display of them. We happened to stop in yesterday whilst Mr. Wirt was concluding the case for the United States in reply to Mr. Clay, and heard enough of the 'tart reply' to make us wish we had heard the 'grand debate' which preceded it. The argument was not exactly limited to the question *coram judice*, but covered other ground. The occupation of Amelia Island, some years ago, by order of the President was introduced into the discussion, its constitutionality questioned on the one hand and defended on the other." [1] And Adams made a characteristic comment on the case, in his diary:

I attended this evening alone the drawing room at the President's. Less company than usual. Bad weather. Heard of Mr. Wirt's reply this day before the Supreme Court to Clay's attack upon the Administration and upon me on Monday in the case of the *Apollon*. G. Hay was in raptures at the scourging Clay received. Clay spoke of it to me himself, but in a very humble tone compared to that of Monday. Clay said he had wanted a half an hour for reply. I said he should have thought of that when he attacked me, where he knew I could not reply. He said Wirt had made my letter to De Neuville a part of his argument. I told him he had fine scope for assailing me where I was not present to defend myself, but in this instance, I had been gratified to learn that my defence had fallen into better hands than my own.

One further decision on international law, rendered a few years later than the period of the Court's greatest activity on this subject, may be noted, because of its intimate connection with the great subject of slavery which was, in the next twenty years, to produce such a profound effect upon the Court's history. It is a singu-

[1] *New York Statesman*, March 30, 1824. See also *Georgia Journal*, March 30, 1824; *J. Q. Adams*, VI, March 15, 17, 1824.

lar fact that the first decision rendered on this delicate and long-debated question should have involved a question of international rather than of domestic law. For several years prior to 1825, cases of violations of the Federal criminal laws against the African slave-trade had crowded the inferior Federal Courts; and the question of the proper disposition of slaves unlawfully introduced into the United States had occasioned to Congress much perplexity.[1] In 1825, the Court was confronted for the first time with the question whether the slave trade was illegal under international law, and if so, what disposition should be made of slaves brought into the country by an American warship from a vessel captured on the high seas. Three years previously, Judge Story, in *La Jeune Eugenie*, 2 Mason, 90, in the First Circuit, had held the slave trade to be contrary to the law of nations, on the ground that it carried with it "a breach of all moral duties, of all the maxims of justice, mercy and humanity, and of the admitted rights which Christian nations now hold sacred, in their intercourse with each other." "I rejoice that you have been able to come to the result you have, so suitable to the character of a Court of Justice and to the nature of our system of government and so congenial to all our best feelings," wrote Jeremiah Mason to Story.[2] "I take it you must necessarily come into conflict with the opinion of Lord Stowell. It will be highly honorable to our country to take the lead and give the law on this subject, and I trust you will be supported by the Supreme Court, and not impeded by any interference

[1] See *Sundry African Slaves* v. *Madrazo; Governor of Georgia* v. *Sundry African Slaves* (1828), 1 Pet. 110; *United States* v. *Attorney-General of Louisiana* (1830), 3 Pet. 57.

[2] *Mason*, letter of Jan. 8, 1822; in the *Josefa Segunda*, 5 Wheat. 338, in 1820, Judge Livingston had referred to "this inhuman traffic for the abolition of which the United States have manifested an early and honorable anxiety."

of the Executive Government." [1] While the decision did credit to Judge Story's moral fervor, it was, nevertheless, altogether in advance of the morals of the times, and in direct conflict with established international law, and with several decisions of the English Courts. The Supreme Court, therefore, when the question was presented in *The Antelope*, 10 Wheat. 66, in 1825, was practically called upon to decide whether it would adhere to international law as then existing, or whether it would decide the question upon moral grounds. Elaborate arguments were made by William Wirt and Francis Scott Key against John M. Berrien of Georgia and Charles J. Ingersoll of Pennsylvania. "I never heard a more interesting case," wrote a newspaper correspondent. "Mr. Wirt's argument was worthy of all praise; his talents are an honor not only to the profession of which he is a member, but to our country and to its Executive." [2] The Court decided that it must adhere to international law as then formulated, which did not regard the slave trade as piracy. Such a decision much relieved the minds of the slavery men of the South, who viewed with apprehension any attempt on the part of the Judiciary to deal with the slavery question in any phase. That the Court, however, was not impervious to the moral issue (which nevertheless was a question for the Legislature rather than for the Court) was seen from the opening words of Marshall's

[1] Story replied, Feb. 21, 1822: "The opinion has been read by several of the Judges here, and in general, I think it not unsatisfactory to them in its results. The Chief Justice, with his characteristic modesty, says he thinks I am right, but the questions are new to his mind."

R. F. Stockton wrote to Daniel Webster, Nov. 5, 1821, referring to the question involved in *La Jeune Eugenie:* "I shall rejoice to hear that you maintain the great point even in the Circuit Court. I should think its fate at Washington would be doubtful, especially if it be true, as Judge Story in one of the papers is made to say, that the Court is called upon to establish a new principle of public law." *Van Tyne Copies of Webster Papers* in Library of Congress; see also *Life of Daniel Webster* (1870), by George T. Curtis, I, 196.

[2] *Boston Patriot*, quoted in *Niles Register*, XXVIII, March 26, 1825.

opinion: "In examining claims of this momentous importance; claims in which the sacred rights of liberty and of property come in conflict with each other; which have drawn from the Bar a degree of talent and of eloquence worthy of the questions which have been discussed; this Court must not yield to feelings which might seduce it from the path of duty, but must obey the mandates of the law. . . . It is not wonderful that public feeling should march somewhat in advance of strict law. . . . Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution in those principles of action which are sanctioned by the usages, the national acts, and the general assent of that portion of the world of which he considers himself as a part, and to whose law the appeal is made." [1]

[1] See *United States* v. *Morris* (1840), 14 Pet. 464, as to the intent of Congress to abolish the slave trade by legislatior

Note. Regarding William Pinkney as an admiralty lawyer, Judge Johnson diss. in *Ramsay* v. *Allegre* (1827), 12 Wheaton, 614, 636, said, referring to Pinkney's argument, in 1918, in *The General Smith*, 4 Wheaton, 438: "A gentleman of the Bar whose knowledge, particularly in admiralty, commanded the highest respect in this Court, is reported to have laid down a doctrine in very explicit terms, which, I will venture to say, has no authority in law; and the Court, carried away probably by the influence of his concession, echoes them in terms which are not only not called for by the case, but actually, as I conceive, contradicted by the decision which is rendered. . . . Now, I have too high an opinion of Mr. Pinkney's law reading, and of his talents as an advocate, not to be well convinced that in this, as well as the residue of the argument attributed to him, he must have been misunderstood."

Judge Story in an account of Pinkney, delivered to the Harvard Law School, in April, 1844, said: "His place has not yet been occupied, and I think never can be, at least in my day." *Law Reporter* (1846), IX.

For interesting description of the arguments of Berrien and Key in the *Antelope Case*, see *A Casket of Reminiscences* (1874), by Henry S. Foote.

CHAPTER FIFTEEN

THE STEAMBOAT MONOPOLY CASE

1822–1824

With the end of the 1823 Term, questions of international and admiralty law ceased to occupy the Court's attention; and questions of National concern again came to the front. When, on March 18, 1823, Judge Henry Brockholst Livingston died at the age of sixty-six and after seventeen years' service on the Bench, the vacancy thus caused arose at a critical juncture in the Court's history; for three cases of immense importance in the field of constitutional law were then pending and awaiting argument — *Gibbons* v. *Ogden* involving the New York steamboat monopoly, *Ogden* v. *Saunders* involving the validity of State bankrupt laws, and *Osborn* v. *Bank of the United States* involving the struggle against the Bank in Ohio. Considerable concern was displayed in the newspapers as to the character of the man whom President Monroe might appoint to fill the vacancy, and there seemed to be slight confidence in his discretion in selection.[1] Many names were mentioned as possible candidates from New York, chief of which were Smith Thompson (then Secretary of War and a brother-in-law of Robert R. Living-

[1] *National Gazette*, April, 1823. See also *New York Evening Post*, March 22, 24, 27, 28. A singular pessimistic expression of Chief Justice Marshall regarding Monroe's possible appointments to the Bench is found in a letter to Judge Story of July 2, 1823: "You alarm me respecting the successor of our much lamented friend. I too had heard a rumor which I hoped was impossible. Our Presidents, I fear, will never again seek to make our department respectable." *Mass. Hist. Soc. Proc., 2d Series*, XIV, July 2, 1823.

ston), Ex-Chancellor James Kent, Chief Justice Ambrose Spencer and Henry Wheaton.[1] Thompson had been offered the position within a week after Livingston's death, but he was doubtful as to accepting, partly because of poor health, and partly because of the fact that (as he wrote) his work when on the New York Supreme Court had led him principally to the sway of the common law, whereas "the questions which arose in the Supreme Court of the United States are mostly other branches of legal science and would therefore be in some measure a new field for me." The salary, he felt, was inadequate "to the expense of living here where you are unavoidably exposed to much company . . . . undoubtedly, the most expensive place in the United States." The chief reason, however, for his reluctance was his belief that he would be nominated by the Republicans as their candidate for President in 1824. "Thompson can undoubtedly have the appointment but is hesitating, having his eyes on the Presidency," wrote Webster to Story. "When a man finds himself in a situation he hardly ever dreamed of, he is apt to take it for granted that he is a favorite of fortune, and to presume that his blind patroness may have yet greater things in reserve for him. In the event of his finally declining, those now talked of as prominent candidates are, J. Kent and Ambrose Spencer. If a nomination were now to be made, I think it would be the former of these two

[1] William H. Crawford, writing to Van Buren, May 9, 1823, said: "Exertions are making to place Mr. Wheaton on it (the Court). . . . In a conversation upon the subject introduced by the President, I said that I believed that the appointment of Mr. Sanford would be as acceptable to the State as that of any other person unless you were disposed to accept it." *Van Buren Papers MSS.*

John C. Calhoun writing July 20, 1823, said: "You say nothing of the vacant place on the Bench. Who ought to fill it? Spencer, Kent, Van Ness, Wheaton, Edwards and Sanford are named. What could be the effect of making the selection of either of these gentlemen? The subject is an important one in any point of view. I consider the officer as the highest, except the Chief Magistrate, under our system." *Amer. Hist. Ass. Rep.* (1899), II.

names, altho' there are some who wish to give a decided rebuke to the Bucktails of N. York by appointing Mr. Spencer. What time may produce no one can say. Mr. Tazewell and some others have mentioned Mr. Macon's name to the Executive. *If he lived in the Circuit, I verily believe he would at this peculiar moment be appointed.* There are *two* of the President's advisers who would I think, give him a decided preference, if locality could be safely disregarded. On the whole, my expectation is that the appointment will be delayed, and that in the end, Mr. Thompson will take it." [1] While Thompson was still hesitating, Adams and Wirt, as members of Monroe's Cabinet, were urging upon the President the tremendous importance of the appointment of a man of the highest character, and acceptable to the whole Nation rather than to local State interests, especially at this particular period when the jurisdiction of the Court was subject to so frequent attack. The lofty status of the Court, and the philosophy by which appointments upon it should be guided, have never been more adequately set forth than in a letter written by Wirt, recommending the appointment of a man whose political faith differed from that of the President — that of the strong old Federalist, Chancellor Kent: [2]

I sincerely wish Judge Thompson could see his interest in relieving you from this embarrassment by accepting the appointment. If he will not, can you make an appointment more acceptable to the Nation than that of Judge Kent? I know that one of the factions in New York would take it in high dudgeon at first. Probably, too, some of the most heated republicans and interested radicals who seize every topic for cavil, might, in every quarter of the Union, harp a

[1] *Van Buren Papers MSS*, letter of Thompson to Van Buren, March 25, 1823; *Story*, I, letter of Webster to Story, April 6, 1823.

[2] *Wirt*, II, 133, letter of Wirt to Monroe, May 5, 1823.

little for a time on the same string. But Kent holds so lofty a stand everywhere for almost matchless intellect and learning, as well as for spotless purity and high-minded honor and patriotism, that I firmly believe the Nation at large would approve and applaud the appointment. It would sustain itself and soon put down the petty cavils which might at first assail it. The appointment of a Judge of the Supreme Court is a National and not a local concern. The importance of that Court in the administration of the Federal Government, begins to be generally understood and acknowledged. The local irritations at some of their decisions in particular quarters (as in Virginia and Kentucky for instance) are greatly overbalanced by the general approbation with which those same decisions have been received throughout the Union. If there are a few exasperated portions of our people who would be for narrowing the sphere of action of that Court and subduing its energies to gratify popular clamor, there is a far greater number of our countrymen who would wish to see it in the free and independent exercise of its constitutional powers, as the best means of preserving the Constitution itself. The Constitution is the public property of the United States. The people have a right to expect that the best means will be adopted to preserve it entire; which can be no otherwise ensured than by organizing each department under it, in such a manner as to enable it to perform its functions with the fullest effect. It is now seen on every hand, that the functions to be performed by the Supreme Court of the United States are among the most difficult and perilous which are to be performed under the Constitution. They demand the loftiest range of talents and learning and a soul of Roman purity and firmness. The questions which come before them frequently involve the fate of the Constitution, the happiness of the whole Nation, and even its peace as it concerns other nations. . . . It is in this view of the subject, I have said, that the appointment of a Judge of the Supreme Court is a *National* and not a *local* concern; and therefore, in making the appointment, I think that instead of consulting the feelings of local factions (whose heat, as Dean Swift says, is always in proportion to their want of light), and instead of consulting the little and narrow

views of exasperated parties, the President of the United States should look to the good of the whole country, to their great and permanent interests, and not to the ephemeral whims and exacerbations of the day. A mediocre appointment would be regarded as a sacrifice to the local factions in New York, or as a sacrifice to the contracted prejudices of the most contracted of our own party there and elsewhere. And I do verily believe that such an appointment to the bench of the Supreme Court would occasion more mortification and disgust, and draw down on the President far more censure than could result from the appointment of Judge Kent. . . . That Bench should be set apart and consecrated to talent and virtue, without regard to the shades of political opinion by which its members may have been or may still be distinguished. If, indeed, a man were a violent, bitter and persecuting federal partisan, intolerant of opposite opinions, I would not place him there; for that is a cast of character which, whether he belonged to the one side or the other, would disqualify him for a seat, there or anywhere else, where judgment was to be coolly and impartially exercised. This, however, is not the character of Judge Kent. . . . With regard to the great subject of State-Rights, which has produced so much excitement in Virginia and Kentucky, it happens that, if he (Kent) has any leaning, it is rather in favor of State-Rights. This has been shown by his decisions in the steamboat cases, where he has uniformly upheld the State laws of New York against all the objections which could be raised of their repugnance to the Constitution and laws of the United States. . . . I expressed these opinions to Mr. Calhoun, two months ago, and he concurred in them.

While Wirt was recommending the Federalist, Kent,[1] it is a singular fact that the Federalist Senator from New York, Rufus King, was strongly urging upon Secretary of State Adams and upon President Monroe

[1] Kent was supported by another strong Democrat, the veteran Col. Marinus Willett of New York, who wrote an urgent letter in his behalf to President Monroe, praising Kent's "candor, integrity and purity" and recommending his nomination despite his Federalist views. *Kent Papers MSS.*

the appointment of his Republican colleague, Martin Van Buren, than whom, he said, no man was "better qualified for a high and difficult judicial station." King also emphasized the especial need of placing upon the Bench a man possessing the rare qualification of "prudence." "Prudence is eminently possessed by the Chief Justice," King wrote, "who, while he reflects honor upon his native State, likewise adorns and imparts strength and harmony to the Constitution of the Nation. It cannot be concealed that the Chief Justice is unfortunately without an Associate who, in this respect, is competent to supply his loss." He furthermore pointed out that, possessing such qualities, Van Buren "might become invaluable in reconciling and adjusting the powers of the General and the State Governments; a reconciliation that, from year to year, becomes more critical and which can be effected by no other means than by the prudent exercise of the powers of the National Judiciary. Upon a subject, the right understanding of which is so essential to the preservation of the public liberties, I cannot forbear to press upon your mind the necessity of the utmost caution (perhaps not always heretofore observed) in the selection of the members of the Supreme Court; a tribunal which not only decides civil and criminal cases affecting individuals, but all questions arising under the Constitution, which by restricting or enlarging the power of the States or of the Union may disturb the nice and complicated balance of our political system. No other nation has established a tribunal so powerful, conclusive and independent. We must not forget that the wisdom of the other departments is inadequate to supply a defect of the Judiciary. We are, therefore, all responsible, and President and Senate above others, that the Supreme Court be so com-

posed that the Master Spirit of the Chief Justice may not die, but, by the appointment from time to time, of able and prudent men, may be rendered perpetual." [1] To Van Buren himself, King had already expressed his indorsement of his nomination, though he had frankly warned him that "the office was very important, and in our system, of great authority, dignity and independence; but that it does not admit of any expectations of ulterior advancement, nor could it tolerate the interference of the Judge in party or personal politics; that he, Van Buren, had been deeply engaged in the party politics of the times. . . . To be a member of the Supreme Court, he must be wholly and forever withdrawn and separated from these connections. The dissolution must be absolute; and entering the Judicial Department, like taking the vow and veil in the Catholic Church, must forever divorce him from the political world. Unless he was confident of his strength to do this, he should not think of the Supreme Court for a moment." And he counseled Van Buren to model himself on Marshall, "who harmonized the powers of the Constitution by strengthening them, while another distinguished man of the same State taught the paradox that these powers could and should be harmonized by weakening of them. This is not only political heresy, but absurdity." To this advice, Van Buren responded, as he wrote to Thompson himself, that: "If I should accept the appointment of Judge, I should consider a total abstinence from interference in party politics as a duty of the most imperious nature, and I feel entire confidence in my ability to withdraw entirely and forever from the scenes in which for many

[1] *King*, VI, letters of April 1, 2, 1823, to Adams and Monroe; memoranda by King, April 7, 1823, of his talk with Van Buren; *Van Buren Papers MSS*, letter of King to Van Buren, April 6, 1823.

years I have taken part." [1] Thompson himself had already asked Van Buren whether he would accept the appointment. John Quincy Adams also concurred with King as to Van Buren's qualifications, and he later said that, he believed that, had Van Buren been appointed, "he would have followed in the tracks of Marshall and proved himself a sound interpreter of National principles." [2] Thompson, however, after considerable vacillation, and apparently after satisfying himself that he stood no chance to be nominated for President as against John Quincy Adams and William H. Crawford, finally accepted the position; and he was nominated to the Senate by President Monroe on December 8, 1823, and confirmed the next day.[3] Curious surmise may be made as to what would have been the history of the law laid down by the Court had Van Buren been on the Bench and in a position to succeed Marshall, twelve years later, as President Jackson's choice for Chief Justice, instead of Taney.

At the Term following this new appointment, the Court was confronted, for the first time in its thirty-five years' existence, with the question of the construction and scope of that great clause in the Constitution granting to Congress the power to regulate commerce between the States. That Marshall and his Associates would give a broad construction to this clause had been long anticipated and feared by the

[1] *Van Buren Papers MSS*, letters of King to Van Buren, April 6, 1823, Van Buren to Thompson, March 30, 1823.

[2] *Life and Letters of George Bancroft* (1908), by M. A. DeW. Howe.

[3] As to Thompson's various attitudes towards the nomination, and towards Van Buren, see letters of Thompson to Van Buren, April 25, June 26, July 11, 1823, letter of Crawford to Van Buren, May 29, Aug. 1, 1823, letter of Van Buren to Thompson, June 4, 1823, *Van Buren Papers MSS*. Van Buren himself in his *Autobiography* in *Amer. Hist. Ass. Rep.* (1918), II, 141, states his belief that King's object was to withdraw Van Buren from politics and from advocacy of Crawford's nomination for the Presidency.

Republicans in Congress, for the question had been actively debated in that body in connection with the subject of the Federal power over internal improvements. "The plan of the Federal Courts seems to be to keep pace with Congress," wrote Nathaniel Macon to Jefferson in 1822. "As Congress attempts to get power by stretching the Constitution to fit its views, it is to be expected, if other departments do not check the attempt, that each of them will use the same means to obtain power, and thus destroy any check that was intended, by the division of power into three distinct and separate bodies." [1] Within six months after this letter was written, the Court expressed to President Monroe an unofficial opinion on the subject of the power of Congress over internal improvements, which would have caused even greater anxiety among the adherents of a limited construction of the Constitution, had the opinion been generally made public. On May 4, 1822, Monroe had vetoed a Cumberland Road bill which sought to extend Federal power over turnpikes within the boundaries of the States. He had embodied his general views as to the proper limitations of such power in a lengthy pamphlet which he caused to be sent to each of the Judges. In acknowledging its receipt, Chief Justice Marshall wrote that, while the question "very much divides the opinions of intelligent men", Monroe's views appeared to him to be "profound" and "most generally just." "A general power over internal improvement, if to be exercised by the Union, would certainly be cumbersome to the Government, and of no utility to the people. But to the extent you recommend, it would be productive of no mischief, and of great good. I despair, however, of the adop-

[1] *John P. Branch Historical Studies* (1909), III, letter of Feb. 2, 1822.

tion of such a measure."[1] Judge Story replied that: "Upon the constitutional question, I do not feel at liberty to express any opinion as it may hereafter perhaps come for discussion before the Supreme Court; but I rejoice that the wisdom and patriotism of the statesmen of our country are engaged in developing the materials for a sound judgment on this highly interesting subject." After these letters were sent, however, it appears that Judge Johnson obtained the views of his Associates and communicated them to the President in the following interesting letter, which showed to what a far-reaching extent the Court was inclined to carry the doctrines enunciated by it in *McCulloch* v. *Maryland:*

Judge Johnson has had the Honour to submit the President's argument on the subject of internal improvement to his Brother Judges and is instructed to make the following Report. The Judges are deeply sensible of the mark of confidence bestowed on them in this instance and should be unworthy of that confidence did they attempt to conceal their real opinion. Indeed, to conceal or disavow it would be now impossible as they are all of opinion that the decision on the Bank question completely commits them on the subject of internal improvement, as applied to Postroads and Military Roads. On the other points, it is impossible to resist the lucid and conclusive reasoning contained in the argument. The principle assumed in the case of the Bank is that the granting of the principal power carries with it the grant of all adequate and appropriate means of executing it. That the selection of these means must rest with the General Government, and as to that power and those means the Constitution makes the Government of the U. S. supreme. Judge Johnson would take the liberty of suggesting to the President that

[1] *James Monroe Papers MSS*, letters of Marshall to Monroe, June 13, 1822, Story to Monroe, June 24, 1822, Johnson to Monroe, undated. See also *Judicial Interpretation of Political Theory* (1914), by William Bennett Bizzell, 115 *et seq.* "The incident is one of the most interesting and unusual in our political history."

it would not be unproductive of good, if the Secretary of State were to have the opinion of this Court on the Bank question, printed and dispersed through the Union.

To what extent Monroe ever made public these unofficial views of the Judges does not appear in any contemporary document.

When the Court convened in 1824, however, it found on the docket for argument the noted case of *Gibbons* v. *Ogden*, 9 Wheat. 1, in which it was destined to express, in immortal terms, its views as to the broad extent of Federal power over internal commerce. The issues presented by this case brought the Court once more into the political contest between the upholders of State-Rights and the believers in a strong Federal Government; for it was urged, not only to adopt a construction of the Constitution enhancing the power of Congress over commerce, but also to hold invalid New York statutes which had been warmly fostered by the leaders of the Republican Party. The Livingston-Fulton steamboat monopoly, whose fate was involved in the case, had been created by Republican legislators, owned by Republican statesmen and defended largely by Republican lawyers — all connected with the faction in New York politics, headed by the Livingstons, Judge Ambrose Spenser and Cadwallader D. Colden. And while the Republicans had long inveighed against the "monster monopoly" of the Bank of the United States chartered by the Federal Government, and had attacked the Court for upholding it in the *McCulloch Case*, they were now engaged in vigorously supporting an even more stringent monopoly chartered by a State. For twenty-four years, Ex-Chancellor Robert R. Livingston and Robert Fulton and their heirs and assigns had enjoyed, under grant from the New York Legislature, an exclusive right to run steam-

boats in the waters of New York. Efforts in the Courts to break this Monopoly had been frequent but unavailing. A case in the United States Circuit Court, in 1811, had been dismissed for want of jurisdiction. A case in the State Court of Errors between the same parties had resulted in a decree upholding the power of the State to grant such exclusive rights. Pending this case, the State had passed a further statute authorizing the seizure of any steam vessel found in New York waters in violation of the Livingston grant, thus practically making it impossible for any person to try his rights in Court, without first forfeiting his vessel. Retaliatory statutes had been passed in New Jersey, Connecticut and Ohio in 1818 and 1822, forbidding boats "operated by fire or steam" under the license granted by the New York Legislature from plying in the waters of those States; and so bitter were the feelings aroused by the Monopoly that, as William Wirt said in his final argument in the Supreme Court, the four States "were almost on the eve of civil war." Meanwhile, exclusive rights of steam navigation had been granted to the Monopoly in 1811 in Louisiana.[1] Similar exclusive rights had also been granted in Massachusetts, New Hampshire, Vermont and Georgia to various persons. Finally, a test case was brought in New York by Ex-Governor Aaron Ogden, of New Jersey, who, having established a steamboat line between New York and Elizabethport in defiance of the Monopoly, had been enjoined by John R. Livingston and had accepted a license from the latter. The defendant was Thomas Gibbons of Georgia,

[1] A suit was brought by Livingston in 1817 in the United States District Court for the Territory of Orleans to enforce his rights under this grant, no printed record of which has ever been published — *Heirs of Livingston and Fulton* v. *Reuben Nichols and Steamboat Constitution*, filed Nov. 21, 1817 (see files of U. S. District Court for Eastern District of Louisiana) — and in which, a year after the decision in *Gibbons* v. *Ogden*, verdict was found for the defendant, Dec. 16, 1825.

a former partner of Ogden, who had refused to act under the Livingston license, and who had started an opposition line in 1818. A motion to dissolve the injunction issued had been heard by Chancellor Kent and denied in 1819; and the Court of Errors had sustained Kent in 1820. The case was finally docketed in the United States Supreme Court in January, 1822, Daniel Webster and William Pinkney appearing as counsel against each other.[1] Before it was reached for argument in 1824, both Pinkney and John Wells, the leading counsel for Gibbons, had died; but a galaxy of great lawyers had been retained — Daniel Webster, William Wirt and David B. Ogden for Gibbons, and Thomas Addis Emmet and Thomas J. Oakley for the Monopoly. Of these, Emmet was the senior, fifty-nine years old, a strong Republican in politics, and noted for eloquence, passion and force. Oakley was forty-one, a former State Attorney-General of brilliant talents. Ogden was fifty-five and had one of the largest practices at the Federal Bar. Webster was forty-two, and had been recognized, since Pinkney's death, as sharing with Wirt and Littleton Waller Tazewell the leadership of the Bar. "We in the South have not his superior and you in the North have not his equal," said William Lowndes of South Carolina. "In point of genius and rare

[1] A previous appeal to the United States Supreme Court in 1821 had been dismissed owing to the fact that the decree appealed from was held not to be a final decree. *Gibbons* v. *Ogden*, 6 Wheat. 448. See also *Livingston* v. *Van Ingen* (1811), 1 Paine, 45; *Livingston* v. *Van Ingen* (1812), 9 John. 807; *Livingston* v. *Ogden and Gibbons* (1819), 4 John. Ch. 48; *Livingston* v. *Gibbons* (1819), 4 John. Ch. 94; *In Re Vanderbilt* (1819), 4 John. Ch. 57; *Ogden* v. *Gibbons* (1819), 4 John. Ch. 176; *Livingston* v. *Tompkins* (1820), 4 John. Ch. 415; *Livingston* v. *Gibbons* (1820), 4 John. Ch. 570; *Livingston* v. *Gibbons* (1821), 5 John. Ch. 250; *North River Steamboat Co.* v. *Hoffman* (1821), 5 John. Ch. 300; *Gibbons* v. *Ogden* (1820), 17 John. 488; *Steamboat Co.* v. *Livingston*, 3 Cowen, 741; s.c. (1824), 1 Wend. 560; *Gibbons* v. *Livingston* (1822), 6 N. J. Law, 236; *Gibbons* v. *Ogden* (1822), 6 N. J. Law, 285; *Gibbons* v. *Ogden* (1822), 6 N. J. Law, 582; *Gibbons* v. *Ogden* (1825), 8 N. J. Law, 288.

endowment inferior to no man among us," wrote Rufus King; and Charles J. Ingersoll termed him "the most eminent practitioner in this Court." [1] Wirt was fifty-two; he had been for six years Attorney-General of the United States and was at the height of his fame as an orator and lawyer. "His presence is peculiarly imposing and all his manners graceful," wrote a New York correspondent at this time. "His voice is powerful, his tones harmonious, and his enunciation clear and distinct. He never speaks without evincing ardor and feeling, and his fluency is peculiar and never interrupted. He delights and convinces, and no man hears him without understanding his arguments — a sure indication of a clear head and a logical mind. His arguments are constantly enlivened by classical allusions and flashes of wit. Many a dry cause, calculated to fatigue and weary, is thus rendered interesting to the spectator as well as to the Court. . . . There is no man of the Bar but esteems and respects Mr. Wirt. His gentlemanly deportment, his affable and conciliating manners, his disposition to serve his professional brethren, his exemption from everything like envy, his equanimity of temper, his admiration of genius and success when displayed by his rivals, — these traits of character are well calculated to secure the admiration and regard of his professional brethren. No ill-natured, no illiberal, no irritating language ever escapes his lips, even in the ardor of argument and reply." [2] Of

[1] *King*, VI, letter to Christopher Gore, Nov. 3, 1822; *Life of Charles J. Ingersoll* (1897), by William A. Meigs, diary entry, Feb. 6, 1823; and for an unusual contemporary picture of Webster, see *Charleston Courier* (S. C.), Jan. 29, 1824. Jefferson wrote to Monroe, Dec. 15, 1824, describing a visit from George Ticknor and Daniel Webster: "I am much gratified by the acquaintance made with the latter. He is likely to become of great weight in our Government." *James Monroe Papers MSS.*

[2] *New York Statesman*, Feb. 24, 1824.

THE COURT-ROOM FROM 1809 TO 1859, NOW THE LAW LIBRARY OF THE COURT

this great galaxy of lawyers, Wirt wrote to his brother-in-law, shortly after the Court convened in 1824: "Tomorrow week will come on the great steamboat question from New York. . . . Come on and hear it. Emmet's whole soul is in the case and he will stretch all his powers. Oakley is said to be one of the first logicians of the age, as much a Phocion as Emmet is a Themistocles, and Webster is as ambitious as Caesar. He will not be outdone by any man, if it is within the compass of his power to avoid it. It will be a combat worth witnessing. I have the last speech, and have yet to study the cause; but I know the facts and have only to weave the argument." [1] Five questions were to be presented for argument in the case. Did the New York statute, granting an exclusive right, conflict with the patents issued by the United States? Was it a regulation of commerce at all? If it was, did the State possess the concurrent right to regulate commerce in this manner? Did Congress possess exclusive power to regulate? Did the New York statute conflict with any Act of Congress? The counsel opposed to the Monopoly differed as to the method to be adopted in the argument. Wirt favored laying stress on the first and last questions; but Webster insisted on the broader ground that the State statute was void, irrespective of its conflict with Federal legislation. As stated by himself, later, he declined to argue this cause "on any other ground than that of the great commercial question presented by it — the then novel question of the constitutional authority of Congress exclusively to regulate commerce in all its forms on all navigable waters of the United States . . . without any monopoly, restraint, or interference created by States' legisla-

[1] *Wirt*, II, 164, letter of Feb. 1, 1824.

tion." [1] It was finally agreed that each counsel should argue on his own lines.

On Tuesday, February 3, the great steamboat case was called, "but as the counsel did not expect to answer so soon and were not prepared, it was postponed till tomorrow," so wrote a Washington correspondent. "Judge Story and Mr. Ogden of New York arrived last evening. They had a narrow escape on their way from Baltimore to this city. The stage was upset by a wagon running against it. None of the passengers were materially injured." [2] On Wednesday, February 4, at eleven o'clock, Webster opened the case. "It was one of the most powerful arguments we ever remember to have heard. The Court-room was excessively crowded," said the *Washington Republican.*[3] He devoted almost his full time, two and a half hours, to developing his broad thesis as to the plenary and exclusive power of Congress over the commerce in question, paying slight attention to the question of the interference of the State statute with the Federal coasting license, and leaving entirely to Wirt the question of the relation of the State statute to the Federal patent laws. Webster himself has described the

[1] *Reminiscences and Anecdotes of Webster* (1877), by Peter Harvey.

[2] *New York Statesman,* Feb. 7, 1824; *Washington Republican,* Feb. 4, 1824 The *National Intelligencer* said, Feb. 6, 1824: "The Hall of the Supreme Court is the center of considerable attraction just now on account of the interesting case which first came up to be argued in it, which is commonly known as the Steam Boat cause."

[3] George Ticknor Curtis in his *Life of Daniel Webster* (1870), I, 216, 217, states that Webster sat up all night to prepare his argument. "To use his own phrase 'the tapes had not been off the papers for more than a year!' He worked all night and, as he has told me more than once, he thought he never on any occasion had so completely the free use of his faculties. . . . At nine A.M., after eleven hours of continuous intellectual effort, his brief was completed. He sent for the barber and was shaved; he took a very slight breakfast of tea and crackers; he looked over his papers to see if they were all in order, and tied them up; he read the morning journals to amuse and change his thoughts, and then he went into Court and made that grand argument which, as Judge Wayne said about twenty years afterward 'released every creek and river, every lake and harbor in our country from the interference of monopolies.'"

moment when he opened out to the Court the scope of the great principle urged by him: "I can see the Chief Justice as he looked at that moment. Chief Justice Marshall always wrote with a quill. He never adopted the barbarous invention of steel pens. That abomination had not been introduced. And always, before counsel began to argue, the Chief Justice would nib his pen; and then, when everything was ready, pulling up the sleeves of his gown, he would nod to the counsel who was to address him, as much as to say, 'I am ready; now you may go on.' I think I never experienced more intellectual pleasure than in arguing that novel question to a great man who could appreciate it, and take it in; and he did take it in, as a baby takes in its mother's milk." Judge Story later described Webster's argument as follows: "Of Mr. Webster's argument in the opening of this cause (for it was closed by Mr. Wirt in a speech of great splendor and force) it may be said to furnish as good a specimen of the characteristics of his mind, as any which could be named. We have here, in as favorable light as we could desire, his clearness and downright simplicity of statement, his vast comprehensiveness of topics, his fertility in illustrations drawn from practical sources; his keen analysis, and suggestion of difficulties; his power of disentangling a complicated proposition, and resolving it in elements so plain as to reach the most common minds; his vigor in generalizations, planting his own argument behind the whole battery of his opponents; his wariness and caution not to betray himself by heat into untenable positions, or to spread his forces over useless ground. . . . Whoever, with a view to the real difficulties of the case and the known ability of his opponents, shall sit down to the task of perusing this argument, will find that it

is equally remarkable for profoundness and sagacity, for the choice and comprehensiveness of the topics, and for the delicacy and tact with which they were handled." [1]

Thomas J. Oakley, counsel for Ogden, followed Webster and delivered a powerful and eloquent argument, occupying an hour on February 4, and the whole day on February 5. At the close of the first day, a Washington correspondent wrote that: "Mr. Oakley did not, however, appear to be at all intimidated by the able argument of his antagonist, but set about attacking the ramparts of the law which had been erected, with his usual coolness and deliberation. He broke ground at a great distance from the immediate question, and commenced a system of mining. His argument thus far has been chiefly confined to a description of the powers of the General and State governments, contending that in many cases they are concurrent, which Mr. Webster denied *in toto*. The argument excites a very lively interest here. The Court-room was crowded with ladies and gentlemen." [2] Of Oakley's argument on the second day, he wrote: "It may probably without any exaggeration be pronounced one of the most ingenious and able arguments ever made in this Court. . . . Upon the Attorney-General will devolve the task of dissecting, analyzing, and refuting, if he can, his reasoning; and I have a curiosity to see how he will manage this ingenious and powerful argument. . . . You can form no idea what interest this decision excites at Washington." The veteran Thomas Addis Emmet occupied the whole of the third day, February 6, and two hours on February 7, with a vehement and brilliantly eloquent oration, described as follows: "It is hardly credible

[1] See MSS discovered in the Congressional Library and quoted by Everett P. Wheeler in his *Daniel Webster, the Expounder of the Constitution* (1905).

[2] *New York Statesman*, Feb. 7, 9, 10, 13, 1824.

that this veteran at the Bar, who is now advanced in years, could endure for so long a time without the least intermission, the *laborem strepitumque fori*. But the cause of which he was the zealous advocate seemed to have absorbed all thought of himself and of time; and he manifested no disposition to pause in his argument. . . . Mr. Emmet's argument drew together an unusual number of spectators. In short, the Court-room was full to overflowing. So great was the assemblage of ladies that many of them were obliged to find seats within the bar. . . . Several gentlemen of distinction were present, among whom was the Secretary of State and many members of both Houses of Congress." Wirt closed the case with a "classical and eloquent" argument, absorbing two hours on February 7 and four hours on February 9; and it is evident that his brilliant effort made upon his auditors a greater impression than Webster's cogently and profoundly reasoned argument. "The great contest seemed to be reserved for Mr. Emmet and the Attorney-General," wrote a correspondent of the *Richmond Enquirer*.[1] Wirt's peroration was "the finest effort of human genius ever exhibited in a Court of Justice . . . a powerful and splendid effusion, grand, tender, picturesque, and pathetic. The manner was lofty and touching; the fall of his voice towards the conclusion was truly thrilling and affecting, and I never witnessed such an effect from any burst of eloquence; every face was filled with the fine transport and prophetic fury of the orator, and all united in applauding the peroration, as affording for matter, diction, manner, happy application and striking effect the most powerful display of real oratory that they ever witnessed." Chancellor George M. Bibb of Kentucky wrote to John

[1] *Richmond Enquirer*, March 2, 1824. See also *Georgia Journal*, March 23, 1824.

J. Crittenden: "I heard from Wirt the greatest display that I have ever heard at the Bar since the days of Patrick Henry. His legal argument was very strong; his peroration was beautiful and grand. I did not hear Webster, nor Oakley, nor Emmet in this case, but all are said to have exhibited great talents. I have heard Webster, Sergeant, and White of Tennessee. Wirt, Webster, White and Ogden are the ablest lawyers, and Walter Jones should also be ranked among the first. Emmet I have not heard, but his reputation is high. After all, I have not been convinced that the Bar of Kentucky does not contain as much talent and force as any other Bar in the Union." [1]

Though Webster, a week after the close of the argument, wrote to his brother, "our steamboat case is not yet decided, but it can go but one way," [2] his

[1] *Life of John J. Crittenden* (1871), 61, letter of March 8, 1824. To Thomas Ruffin, later Chief Justice of North Carolina, his friend Henry Seawell wrote, Feb. 12, 1824, describing the argument as follows, *Papers of Thomas Ruffin*, I, 292: "My time begins to hang heavily upon me — the novelty of scene has passed away; I have been physicked with the expression of sympathy for the Greeks; I have attended the Supreme Court and heard several interesting questions relative to State-Rights discussed; and the right of Congress to make internal improvements being common talk for the hackmen; I may say in truth I am pretty well gorged with Washington. . . . The great men in the Supreme Court almost read their speeches — they have a *book* in manuscript on each point, fastened together in the form of a bill in equity. . . . The counsel in argument begin so low as scarcely to be heard and gradually swell until they fairly rave; then they gently subside into a soft whisper; their gesticulation is menacing, both to the Court and the bystanders, and an equal portion of all they say is distributed to every part of the hall. The Constitution of the United States appears to be acquiring in the political world what was ascribed to the philosopher's stone in the physical regions. It is gathering, by its own growth, the capacity of converting everything into exclusive jurisdiction of Congress; for according to the construction now contended for, and what is more than probable will be supported by the Supreme Court, the States can do nothing, what it is not in the power of Congress to *regulate;* and there is scarcely anything they can act upon at all — the trade or commerce, being subject to the regulation of Congress, is supposed to draw after it almost all power of regulation, and according to a definition given to the word 'commerce' by the Attorney-General that it means '*intercourse.*' I shall soon expect to learn that our fornication laws are unconstitutional."

[2] *Letters of Daniel Webster* (1902), ed. by Claude H. Van Tyne, letter of March 15, 1824. Writing to Jeremiah Mason, the same day, Webster said: "We have

confidence was not entirely warranted by the theretofore known trend of the views of the various members of the Court. While Marshall and Washington were both strongly Federal in their political doctrines, Todd and Duval were equally firm in their State-Rights views; Johnson in a recent case on Circuit in South Carolina had held that the Federal power over interstate commerce was exclusive; Story's view, however, was more problematical, for, only four years before, in *Houston* v. *Moore*, 5 Wheat. 1, in 1820, he had expressed extremely broad views as to the concurrent powers of the States on many subjects. If he held to this position in the *Steamboat Case*, it was open to him to deny Webster's doctrine that the power of Congress in the matter was exclusive of the State, and to decide that the whole question turned on whether the New York statute did or did not "run counter" to any law of Congress. The newly appointed Judge, Smith Thompson of New York, having been a brother-in-law of the originator of the Monopoly, Robert R. Livingston, and restrained also by family affliction in the recent death of his daughter, did not take his seat upon the Bench until February 10, after the close of the argument.

The outcome of the case was awaited with intense interest, not only in New York but throughout those States over which the steamboat Monopoly had so powerful a control.[1] On February 24, a New York paper said that: "Great anxiety is manifested in this city to learn the decision of the great steamboat ques-

no opinion yet in the Steam Boat cause; but I presume there can be no doubt how it will go. The case of collision is, I think, unquestionably made out; and I have no doubt the Court will decide that, as far as respects commerce, between different States (which is this case) the law of New York is inoperative. Possibly the navigation of the New York waters between port and port in her own territory may be subject to a different consideration."

[1] See *New York Statesman*, Feb. 14, 1824.

tion which has lately been argued with consummate ability at Washington."[1] Meanwhile, Chief Justice Marshall sustained an accident dislocating his shoulder, which delayed the writing of the opinion. On March 1, a Washington correspondent wrote that "it is rumored that the decision will be adverse to the State of New York *in toto*"; and on March 3, another New York paper contained the following extremely interesting comment:[2] "Inquiries are hourly made respecting the anxiously-looked-for decision of the Supreme Court in this important case. The opinion of the Court has not yet been given, nor do we know when it will be. Judge Marshall, we are informed, had commenced writing the opinion when his labors were interrupted by his unfortunate fall; and it is understood that Mr. Justice Story is now engaged in completing it." The concluding sentence contained a fact which, so far as is known, no biographer or eulogist of Marshall or of Story, and no law writer, has ever mentioned, that Judge Story is possibly entitled to share in the glory of having aided in writing the opinion in *Gibbons* v. *Ogden*. Hitherto, the honor of having settled the trend of the whole American law of interstate commerce has been attributed entirely to Marshall.

The decision in the case was finally announced on March 2, 1824, only three weeks after the argument. "This morning, his Honor, Chief Justice Marshall,

[1] *New York Commercial Advertiser*, Feb. 24, 1824. "We regret to hear from Washington that on Thursday evening (February 19) as Chief Justice Marshall was stepping from his carriage on returning to his lodgings from the President's drawing-room, his foot slipped and he fell, by which accident his shoulder was dislocated and his head somewhat bruised. The bone was soon replaced by a surgeon, but he will be confined to his room for some time; and as there are many important causes upon the docket, the vacancy upon the Bench makes the accident a double misfortune." See also *New York American*, Feb. 25, 1824.

[2] *New York Statesman*, March 4, 1824; *New York Commercial Advertiser*, March 3, 1824.

appeared for the first time since his confinement on account of the dislocation of his shoulder, and took his seat on the bench of the Supreme Court," wrote a Washington newspaper correspondent. "His return to his elevated and important station is welcomed by every member of the Bench and the Bar, and the whole community. The Court-room was thronged at an early hour in anticipation of what has taken place — the reading of the opinion of the Court in the great *Steamboat Case*." Another correspondent wrote that the reading of the opinion took three quarters of an hour, and that "the decision excited as much interest as the argument. Many spectators were present, who in their eagerness to hear (the Chief Justice reading in a low, feeble voice) collected close around the bench." [1] In his opinion — "that opinion which has done more to knit the American people into an indivisible Nation than any other one force in our history, excepting only war," [2] — the Chief Justice gave, for the first time in the history of the Court, a full interpretation of the meaning of the Commerce Clause of the Constitution, defining in memorable terms the words "regulate" and "commerce." "Commerce undoubtedly is traffic, but it is something more, it is intercourse." It comprehends navigation. It comprehends every species of commercial intercourse among States and nations, and "is regulated by prescribing rules for carrying on that intercourse." Though this definition now seems almost a self-evident truism, so embedded has it become in our law, the rad-

[1] *New York Commercial Advertiser, New York Statesman,* March 5, 1824. On March 15, 1825, Marshall delivered the opinion of the Court (unreported) in the case of *Cornelius Vanderbilt* v. *John R. Livingston,* "the question being the same with that involved in the Steamboat cause, decided at last Term and submitted without argument by Webster against Henry Wheaton." *National Intelligencer,* March 21, 1825.

[2] *Marshall,* IV, 429.

ical departure which it made from the views popularly held in 1824 as to the limits of the Federal power to regulate commerce may be best appreciated, by contrasting it with the restricted scope which President Monroe had then just expressed in his veto of the Cumberland Road Act in 1822. "Commerce between independent powers or community is universally regulated by duties and imports. It was so regulated by the States before the adoption of this Constitution, equally in respect to each other and to foreign Powers. The goods and vessels employed in the trade are the only subject of regulation. It can act on none other. A power, then, to impose such duties and imports in regard to foreign nations and to prevent any on the trade between the States, was the only power granted." [1] The further question which had been urged, whether the States retained the power to legislate on the subject in the absence of Congressional legislation, or whether the power of Congress was exclusive, Marshall found unnecessary to decide in this case, since he held that Congress, by enacting the Federal coasting laws, had already acted upon the subject, and hence that the State statute, being in conflict with the Federal law, was unconstitutional. Judge Johnson in a concurring opinion was less cautious, and maintained the exclusiveness of the Federal power over commerce in the fullest degree.

Of the indebtedness of the Chief Justice to Webster's great argument, there can be no question; and Webster himself said later that: "The opinion of the Court, as rendered by the Chief Justice, was little else than a recital of my argument. The Chief

[1] See *Federal Control of Interstate Commerce*, by George W. Wickersham, *Harv. Law Rev.* (1910), XXIII.

Justice told me that he had little to do but to repeat that argument, as that covered the whole ground. And, which was a little curious, he never referred to the fact that Mr. Wirt had made an argument. He did not speak of it once. . . . That was very singular. It was an accident, I think. Mr. Wirt was a great lawyer, and a great man. But sometimes a man gets a kink and doesn't hit right. That was one of the occasions. But that was nothing against Mr. Wirt." [1]

In view of the pinnacle on which Marshall's opinion has ever since been placed, it is interesting to note that all his contemporaries did not concur in the general praise. John Randolph, writing soon after the delivery of the opinion, said: [2]

It is the fashion to praise the Chief Justice's opinion in the case of Ogden against Gibbons. But you know I am not a fashionable man; I think it is unworthy of him. Lord Liverpool has set him an example of caution in the last speech of the King; one that shames our gasconading message. I said it was too long before I read it. It contains a great deal that has no business there, or indeed anywhere. . . . A judicial opinion should decide nothing

[1] *Reminiscences and Anecdotes of Webster* (1877), by Peter Harvey. Writing to Edward Everett, Oct. 30, 1851, Webster said: "I presume the argument in *Gibbons* v. *Ogden* was written by me and given to Mr. Wheaton. The argument is a pretty good one and was on a new question. It has been often observed that the opinion of the Court delivered by Chief Justice Marshall follows closely the track of the argument. He adopts the idea which I remember struck him at the time — that by the Constitution the commerce of the several States has become a unit."

Judge Wayne in the *Passenger Cases* in 1849 said: "The case of *Gibbons* v. *Ogden*, in the extent and variety of learning, and in the acuteness of distinction with which it was argued by counsel, is not surpassed by any other case in the reports of Courts. In the consideration given to it by the Court, there are proofs of judicial ability, and of close and precise discrimination of most difficult points, equal to any other judgment on record. . . . The case will always be a high and honorable proof of the eminence of the American Bar of that day, and of the talents and distinguished ability of the Judges who were then in the places which we now occupy." 7 How. 283, 437.

[2] *Life of John Randolph* (1851), by Hugh A. Garland, II, 212, letter of Randolph to Dr. Brockenbrough, March 3, 1824.

and embrace nothing that is not before the Court. If he had said that "a vessel, having the legal evidence that she has conformed to the regulations which Congress has seen fit to prescribe, has the right to go from a port of any State to a port of any other with freight or in quest of it, with passengers or in quest of them, *non obstante* such a law as that of the State of New York, under which the appellee claims," I should have been satisfied. However, since the case of *Cohen* v. *Virginia*, I am done with the Supreme Court. No one admires more than I do the extraordinary powers of Marshall's mind; no one respects more his amiable deportment in private life. He is the most unpretending and unassuming of men. His abilities and his virtues render him an ornament not only to Virginia, but to our Nation. I cannot, however, help thinking that he was too long at the Bar before he ascended the Bench; and that, like our friend T——, he had injured, by the indiscriminate defense of right or wrong, the tone of his perception (if you will allow so quaint a phrase) of truth or falsehood.

Randolph's view, however, was not generally held by his contemporaries. Throughout the United States, the newspapers, regardless of political affiliation and with few exceptions, highly praised the decision and rejoiced over the destruction of the obnoxious steamboat Monopoly. The New York papers naturally hailed it with especial satisfaction.[1] "This morning, Chief Justice Marshall delivered one of the most able and solemn opinions that has ever been delivered in any Court on the *Steamboat Case*," wrote the correspondent of the *New York Evening Post*. "The Court-room was crowded with people, and during more than an hour, which was consumed in pronouncing the decision of the Court, the most unbroken silence prevailed. Chief Justice Marshall commenced by stating the importance of the case

[1] *New York Evening Post*, March 5, 8, 18, 24; *New York Commercial Advertiser*, March 12, 1824; *New York Statesman*, March 8, 1824. See also *Columbian Centinel*, March 10, 1824.

and by passing a short but dignified eulogium on the late Judiciary of the State of New York. He stated the regret which was felt by the highest tribunal in the Nation in differing from the opinion which the Courts of New York had given to the world on a great constitutional question. The Chief Justice then proceeded in his long and luminous view of the *Steamboat Case*. This opinion . . . presents one of the most powerful efforts of the human mind that has ever been displayed from the bench of any Court. Many passages indicated a profoundness and a forecast, in relation to the destinies of our confederacy, peculiar to the great man who acted as the organ of the Court. The steamboat grant is at an end." Many other New York papers published the opinion in full, and said editorially that it would "command the assent of every impartial mind competent to embrace such a subject"; that it was "written with great clearness, perspicuity and, considering the importance of the subject, with great conciseness"; and that it was "probably the strongest document in support of the powers of the Federal Government that has ever issued from the same authority." In other parts of the country, the papers greeted the decision with equal approval.[1] "The constitutional law which is so thoroughly expounded in this masterpiece of judicial reasoning concerns every citizen. . . . It is matter for general complacency that unlimited scope is now afforded to enterprise and capital in steam naviga-

[1] *National Gazette*, March 9, 1824; *New Brunswick Fredonian*, March 11, 1824; *Louisville Public Advertiser*, March 28, 1824; *Charleston Courier*, March 17, 1824; *Augusta Chronicle and Georgia Advertiser*, March 17, 1824; *Missouri Republican* (St. Louis), April 26, 1824. See also *The Federal Power over Carriers and Corporations* (1907), by E. Parmalee Prentice, and the following newspapers mentioned therein: *New York National Union*, March 13, 1824; *Connecticut Courant*, March 9, 1824; *Albany Argus*, March 9, 1824; *Delaware Gazette* (Wilmington), March 19, 1824.

tion," said a Philadelphia paper. "The unprincipled steamboat monopoly of New York is at length broken up. . . . The waters are now free, and those who heretofore held with an iron grasp, and exercised with unfeeling perverseness, their precarious power will now perhaps lament, when it is too late, the rashness and severity which has involved them in embarrassment, if not ruin," said a New Jersey paper. "We not only believe the opinion of the Court to be correct, but we feel confident that, had the same case been tried by any competent tribunal not within the State of New York, the result would have been the same," said a Kentucky paper. "This decision will have an important bearing upon the navigation companies of New York, which have been brought into existence and pampered by the unnatural and unconstitutional measures adopted by the Legislature of that State," said a South Carolina paper. A Georgia paper said: "The principle settled in the great Steam Boat Question recently before the Supreme Court of the United States is one of such vast interest and importance to our country that we deem it a duty to lay the entire opinion of the Court, long as it is, before our readers. . . . The ability displayed in it will amply compensate for . . . its perusal. We cannot suppose that the decision which has conclusively determined that the navigable waters of every State are the common passway of all the citizens of the United States, so that all boats or vessels however propelled, sailing under coasting licenses have a right to traverse them, will be unacceptable to any portion of the American population, who have not an *interest* in wishing that a question of this magnitude had been brought to a different result." A Missouri paper said: "Some of the New Yorkers show themselves a little restive

under the late decision of the U. S. Supreme Court on the subject of the steam boat monopoly. They may rest assured that it is a decision approved of in their sister States, who can see no propriety in the claim of New York to domineer over the waters which form the means of intercourse between that State and others, and over that intercourse itself."

The effects of the decision were at once felt in the waters of New York and the other States. Shortly after the fourteenth of March, the newspapers of the North carried this item: "Yesterday the Steamboat *United States*, Capt. Bunker, from New Haven, entered New York in triumph, with streamers flying, and a large company of passengers exulting in the decision of the United States Supreme Court against the New York monopoly. She fired a salute which was loudly returned by huzzas from the wharves." A representative Southern paper spoke of "the immense public advantages that flow from the decision. The fare in the steamboats that ply between New York and New Haven has been reduced from five to three dollars. The boats that heretofore went from Charleston to Hamburg now touch at Savannah and come directly to the wharves of Augusta. On Monday, the 29th, two steamboats from Charleston arrived at Augusta. Their arrival was greeted by the citizens who fired a *feu de joie*, accompanied by a band of music, which was returned by one of the boats, amidst repeated huzzas and cries of 'down with all monopolies of commerce and manufactories — one is as great an evil as the other. Give us *free trade* and sailor's rights!'" [1] Shortly over a year after the decision, *Niles Register* reported that the number of steamboats plying from New York had increased from six to forty-three.[2]

[1] *Georgia Journal*, April 6, 1824.

[2] *Niles Register*, XXIX, Nov. 12, 1825.

As revealed in the above comments, the chief importance of the case in the eyes of the public of that day was its effect in shattering the great monopoly against which they had been struggling for fifteen years. It was the first great "trust" decision in this country, and quite naturally met with popular approval on this account. But economic results of more far-reaching importance than the mere demolition of the monopoly were involved, which were not appreciated until later years. The opening of the Hudson River and Long Island Sound to the free passage of steamboats was the most potent factor in the building up of New York as a commercial center. The removal of danger of similar grants of railroad monopolies in other States promoted immensely the development of interstate communication by steam throughout the country; for the first railroad was built only five years later. The coal industry, then but an experiment, was developed through the growth of New England's manufacturing industries, made possible by cheap transportation of coal by water. In short, Marshall's opinion was the emancipation proclamation of American commerce.[1]

It was not, however, the economic results of the Court's decision in the *Steamboat Case* which signalized its leading place in the history of American law. The political effect of Marshall's opinion was equally potent; for it marked another step in the broad construction of the Constitution, and became at once a mighty weapon in the hands of those statesmen who favored projects requiring the extension of Federal authority. As has been pointed out, before and during and immediately after the argument of *Gibbons* v. *Ogden*, Congress was engaged in a vigorous debate

[1] *History of the American Bar* (1911), by Charles Warren.

on two subjects which for ten years had sharply divided the two political parties — the power of the National Government over internal improvements and its power to enact protective tariffs in aid of favored interests.[1] While the actual decision of the case was based on the conflict between the New York and the Federal statutes, the language used by the Chief Justice in his opinion as to the extent of the power of Congress was directly contrary to the contentions of the Republican Party, and could be used in support of every political measure favored by its opponents. Republican Congressmen were not slow in perceiving the aid which the opinion gave to the advocates of the obnoxious measures of Federal expansion. "More danger is now to be apprehended from tyranny in the head than from anarchy in the extremities," said Stevenson of Virginia. "We are now sweeping down at one blow the independence and power of the State Governments." "Not one or two but many States in the Union see with great concern and alarm the encroachments of the General Government on their authority," said John Randolph, and denouncing the tariff bill, as based on a broad construction of the commerce clause of the Constitution, he added: "There are firebrands enough in the land, without this apple of discord being cast into the assembly."

Some of the newspapers of the country were also greatly concerned over the political effects of Marshall's views. A South Carolina paper said that: "The exercise of the power of the United States Courts in matters of this kind cannot but be interesting to the individual States in its bearing on the independence of their

[1] *Marshall*, IV, chap. 8; see also *18th Cong., 1st Sess.*, Jan. 12, 14, 16, 27, 28, 29, 30, Feb. 3, 4, 5, 6, 9, 10, April 21, 23, 1824, for debates on the Roads and Canals Survey Bill; *ibid.*, Feb. 11, to April 16, 1824, for debate on the Tariff Bill.

legislation. . . . By this decision, it would appear that the sovereignty of a State under the Federal Constitution is not unlimited. A principle of the greatest magnitude is thus settled in the United States, and consequences of material interest in every part of the Republic will flow from its decision." [1] The *Richmond Enquirer* considered the opinion as "too elaborate, too long", and as traveling beyond the record; and it sounded this note of warning to its readers: "The last paragraph of the opinion states what would be the consequence of contracting 'by construction into the narrowest possible compass' 'the powers expressly granted to the Government of the Union.' It 'would explain away the Constitution of our country, and leave it (says the opinion) a magnificent structure, indeed, to look at, but totally unfit to use.' And suppose we fly to the opposite extreme, suppose we stretch the power of the Government by a most liberal construction, suppose we consider 'necessary' to be synonymous with 'convenient', what would be then the state of the case? The State Governments would moulder into ruins, upon which would rise up one powerful, gigantic and threatening edifice. To which of these extremes the stream of decisions from the Supreme Court is sweeping, we refer to the case of McCulloch and the case of the Cohens." Similar views were vigorously expressed by Thomas Addis Emmet, arguing in May, 1824, before the New York Court of Chancery.[2] He viewed "the progress of the Union towards consolidation, with a fearful solicitude." "If some of the principles of *Gibbons* v. *Ogden* are not overruled within twenty years, the Constitution will before

[1] *Charleston City Gazette* (S. C.), March 10, 24, 1824; *Georgia Journal*, April 6, 1824; *Richmond Enquirer*, March 16, 1824.

[2] *North River Steamboat Co.* v. *Livingston* (June, 1824), 1 Hopkins, Ch. 170; s.c. 3 Cowen 741.

then have verged towards a form of government which many good men dread, and which assuredly the people never chose"; and he concluded with the following pessimistic prediction: "There is a pretty general impression that the decisions of that Court on constitutional law tend to such a result. It is the avowed opinion of Mr. Jefferson and of many who now labor to check it. If that impression be correct, the consequences are much to be lamented; for such a course pursued by that Court (the value and importance of which ought to be estimated most highly) may well aid in its own destruction, and possibly in that of the fabric of our government. . . . It is upon State-Rights we stand and State-Rights are State liberty. They are more; they are in this land the bulwarks of individual and personal liberty; they are the outposts of the Constitution. While they are preserved entire, our federative Union will stand against the shocks of time and the approaches of despotism. But let them be broken down or suffered to moulder away, and a consolidated power must succeed in governing this mighty empire. Consolidation will be the euthanasia of our Constitution. Make that consolidated government as democratic and free as you please, make its base as broad and its principles as liberal as philanthropy and philosophy can devise; it will still be a single government over a vast extent of territory; it will follow — it will surely and speedily follow — the course of all the governments of ancient times and modern Europe, which began with elective rights and free institutions but have silently sunk into despotisms."

On the other hand, the newspapers which favored the views of the opponents of the Republican Party applauded the breadth of the opinion, the *Connecticut*

Courant saying: "It was natural that the Courts of New York should insensibly receive a bias in support of the legislative proceedings of that State; and it was wisely provided by the Constitution of the United States that questions of this nature should be finally settled by a tribunal removed from the influence of those State and private interests which give rise to them. Thus every year unfolds new relations growing out of our Federative and republican government. It will take many years to settle the boundary line between State and Federative rights. These will be adjudged peaceably as they arise, so long as the decisions of the Supreme Court of the United States shall continue to be respected. It is the duty of every citizen to cherish a spirit of respect and acquiescence in the decisions of this Court. If the States should once embrace a feeling of hostility or even jealousy toward the National councils, it is to be feared those ties which bind us together will be dissolved, and we shall again be made to experience all the evils of the old Confederation, or, what is worse, of separate and independent States." [1]

The doctrine thus proclaimed by the Court in the *Steamboat Case* filled Jefferson with horror. He was an old man of eighty-two years; he had been out of office for sixteen years; yet his frequent letters to his personal friends in the years since 1818, frequently printed in the newspapers, had become the fountain-head of Democratic dogma. Accordingly, one of the last of these letters, written to William B. Giles, December 26, 1825 (in the year before his death), represented the general attitude of his party: "I see, as you do, and with the deepest affliction, the rapid strides with which the Federal branch of our Government

[1] *Connecticut Courant*, March 9, 1824.

is advancing towards the usurpation of all the rights reserved to the States, and the consolidation in itself of all powers, foreign and domestic; and that too by constructions which, if legitimate, leave no limits to their power. Take together the decisions of the Federal Court, the doctrines of the President and the misconstructions of the Constitutional Compact acted on by the Legislature of the Federal branch, and it is but too evident that the three ruling branches of that department are in combination to strip their colleagues, the State authorities, of the powers reserved by them, and to exercise themselves all functions foreign and domestic. Under the power to regulate commerce, they assume indefinitely that also over agriculture and manufactures, and call it regulation to take the earnings of one of these branches of industry — and that, too, the most depressed — and put them into the pockets of the other — the most flourishing of all. Under the authority to establish postroads, they claim that of cutting down mountains for the construction of roads, of digging canals, and, aided by a little sophistry on the words 'general welfare', a right to do, not only the acts to effect that which are sufficiently enumerated and permitted, but whatsoever they shall think or pretend will be for the general welfare."

There was one question in connection with the Court's trend of decision to which Jefferson made no reference, and on which in all his correspondence he ever preserved a discreet silence — the slavery issue. While the wide scope of Marshall's opinion gave concern to the South with reference to the political issues of internal improvements and tariffs, the effect of the Court's constitutional doctrines as to Congressional power was viewed with even greater alarm in its relation

to commerce in slaves. Not without reason did a Representative from Virginia rise on the floor of Congress, a month after the decision, and say with solemnity: "Sir, we must look very little to consequences, if we do not perceive in the spirit of this construction, combined with the political fanaticism of the period, reason to anticipate, at no distant day, the usurpation on the part of Congress of the right to legislate on a subject, which, if you once touch, will inevitably throw this country into revolution — I mean that of slavery." [1] For the slavery issue had been presented during the argument of the *Gibbons Case*, in connection with the discussion of the respective powers of the States and of Congress. Emmet had pointed out that the power to legislate in prohibition of the importation of slaves had been exercised by many States; that by the Constitution slaves were treated as articles of commerce; that, in 1803, Congress passed an Act imposing penalties on the importing or landing of any person of color in any States which by law had prohibited or should prohibit their admission or importation, and he asked: "How could Congress do this, if the power of prohibiting the trade were not unquestionably possessed by the States in their sovereign capacity?" From this, he argued that the States had concurrent power with Congress in the regulation of commerce. Webster in his argument referred to the question, but declined to discuss the constitutionality of the State laws, until their particular provisions should be more clearly set forth. Neither Oakley nor Wirt appear to have adverted to the subject of slavery. The Chief Justice, however, in his opinion disposed of the whole argument in a single paragraph, by pointing

[1] Speech of Robert S. Garnett of Virginia, April 2, 1824. *18th Cong., 1st Sess.*, 2098.

out that, by the express provision of the Constitution, the power of the States to prohibit the importation of slaves previous to the year 1808 "constitutes an exception to the power of Congress to regulate commerce, and the exception is expressed in such words as to manifest clearly the intention to continue the pre-existing right of the States to admit or exclude, for a limited period", but for a limited period only; and "the possession of this particular power, then, during the time limited in the Constitution, cannot be admitted to prove the possession of any other similar power." Marshall thus clearly intimated that the power of the States over the importation of slaves did not extend beyond the year 1808, and that State laws passed later with reference to the subject would be invalid. It was this phase of his opinion which caused great alarm in the South, for the specific question had already arisen in two cases in the United States Circuit Courts. Virginia and South Carolina had enacted statutes directed against the entrance of free negroes into the State, and providing for their detention in custody until the vessel in which they arrived should leave port. By these statutes, thus interfering with the right of transit between the States, the South attempted to protect itself against the possibility of insurrectionary movements being stirred up amongst the slave population by the presence of free negroes from Northern States.[1] The validity of the Virginia law had been contested before Chief Justice Marshall in the Circuit Court, in the case of *The Brig Wilson*, in 1820;

[1] See debate in the House, Jan. 31, 1849, for an interesting discussion by Congressmen Robert B. Rhett and Isaac F. Holmes of South Carolina, as to the origin and necessity of these laws. Holmes said: "The whole thing was done with a view to self-protection after the experience of the year 1823, in consequence of Denmark Vesey and other blacks coming from the North for the purpose of creating an insurrection, which was prevented, only by timely discovery, from bursting with all its horrors upon the city of Charleston." *30th Cong., 2d Sess.*

but he had evaded the dangerous issue by construing one of the statutes involved as inapplicable to the facts in the case.[1] In the fall of 1823, however, eight months before the decision in *Gibbons* v. *Ogden*, Judge Johnson had met the issue squarely in a case in the Circuit Court for the District of South Carolina, and, though a Republican appointed by Jefferson, he had held the South Carolina statute clearly unconstitutional, stating that the right of the Federal Government to regulate commerce between sister States and with foreign nations was "a paramount and exclusive right." "The plea of necessity is urged," he said "and of the existence of that necessity, we are told, the State alone is to judge. Where is this to land us? Is it not asserting the right in each State to throw off the Federal Constitution at its will and pleasure? If it can be done as to any particular article, it may be done as to all, and, like the old Confederation, the Union becomes a mere rope of sand."[2] This decision had been bitterly resented by South Carolina, and her officials had proceeded to enforce the statute, in flat disregard of the decision, and in sympathy with the threat made by one of the counsel at the argument that "if South Carolina was deprived of the right of regulating her colored population, it required not the spirit of prophecy to foretell the result; and rather than submit to the destruction of the State I would prefer the dissolution of the Union." *Niles Register* regarded the issue involved as more dangerous to the existence of the Union than even the Missouri question, and said that while Johnson's decision was "such as everyone must have expected that it would be . . . the decision

[1] *The Brig Wilson*, 1 Brock, 423; *Elkinson* v. *Deliesseline*, Federal Cases No. 4366.

[2] See especially *John C. Calhoun and the Labor Question*, by E. Parmalee Prentice, *Harv. Law Rev.* (1900), XIV.

is said to have created much excitement at Charleston, and no wonder; for self-preservation is said to be the first principle of law." [1] Judge Johnson, himself, was much perturbed over the recalcitrant attitude of the State and wrote to John Quincy Adams (then Secretary of State): "I am daily made sensible that the eyes of the community are turned most particularly to the Judges of the Supreme Court for protection of their constitutional rights, while I feel myself destitute of the power necessary to realize that expectation. Hence, altho obliged to look on and see the Constitution of the United States trampled on by a set of men, who, I sincerely believe, are as much influenced by the pleasure of bringing its functionaries into contempt, by exposing their impotence, as by any other consideration whatever, I feel it my duty to call the attention of the President to the subject as one which may not be unworthy of an official remonstrance of the Executive of the States." [2] And Marshall wrote to Judge Story:

[1] See *Niles Register*, XVII, XXIV, XXV. On Dec. 25, 1819, it said in reference to the South Carolina laws when first proposed: "If a free black, who is a 'citizen', pleases to locate himself in South Carolina, he may undoubtedly do so, any law of the State to the contrary notwithstanding." On Aug. 23, 1823, it said that Judge Johnson's decision was "such as every one must have expected that it would be. . . . The decision is said to have created much excitement at Charleston — and no wonder, for self preservation is said to be the first principle of law. We trust, however, that no possible injury can result from the proceeding." On Sept. 6, 1823, it printed the opinion in full; and on Sept. 20, after saying that "the Charleston papers have teemed with essays on the subject," it printed a long letter from one of the counsel in the case. See also *ibid.*, XXVII, Dec. 18, 24, 1824, Jan. 8, 1825. The *Washington Union* edited by the veteran, Thomas Ritchie of Richmond, said, March 13, 1851: "This law of South Carolina was enacted at a moment when Charleston was threatened with insurrection. Colored sailors were suspected of having ministered to the fuel. To repress such danger, the law was passed. We well recollect when Judge Johnson leaned in his decision against the execution of the law. It threw Charleston into a flame which extended into Virginia. Mr. Jefferson and his political associates took the other side and vindicated the right of South Carolina to pass such a moral quarantine law."

[2] Quoted in *31st Cong., 1st Sess., App.*, 1661, Sept. 12, 1850, letter of Johnson to Adams, July 3, 1824; *Story Papers MSS*, letter of Marshall to Story, Sept. 26, 1823.

Our brother Johnson, I perceive, has hung himself on a democratic snag in a hedge composed entirely of thorny State-Rights in South Carolina, and will find some difficulty, I fear, in getting off into smooth, open ground. You have, I presume, seen his opinion in the *National Intelligencer*, and could scarcely have supposed that it would have excited so much irritation as it seems to have produced. The subject is one of much feeling in the South. Of this I was apprised, but did not think it would have shown itself in such strength as it has. The decision has been considered as another act of judicial usurpation; but the sentiment has been avowed that, if this be the Constitution, it is better to break that instrument than submit to the principle. Reference has been made to the massacres of St. Domingo, and the people have been reminded that those massacres also originated "in the theories of a distant government, insensible of and not participating in the dangers their systems produced." It is suggested that the point will be brought before the Supreme Court, but the writer seems to despair of a more favorable decision from that tribunal, since they are deserted by the friend in whom their confidence was placed. Thus you see fuel is continually added to the fire at which *exaltées* are about to roast the Judicial Department. You have, it is said, some laws in Massachusetts, not very unlike in principles to that which our brother has declared unconstitutional. We have its twin brother in Virginia; a case has been brought before me in which I might have considered its constitutionality, had I chosen to do so; but it was not absolutely necessary, and as I am not fond of butting against a wall in sport, I escaped on the construction of the act.

Two months after the decision in *Gibbons* v. *Ogden*, Attorney-General William Wirt rendered an opinion to President Monroe, holding the South Carolina statute unconstitutional; and the President, to whom the British Government had complained of the application of the statute to its citizens, wrote to the Governor of the State urging a repeal of the law.[1] No atten-

[1] See opinion of Wirt, May 8, 1824, *Ops. Attys.-Gen.*, I, 659. Seven years later, March 25, 1831, Attorney.-General Berrien gave an opinion directly to the contrary,

tion, however, was paid to this request; but on the contrary, the Governor sent a message to the Legislature, December 1, 1824, urging a reaffirmance of its policy and containing the following truculent sentiments of Nullification: "The evils of slavery have been visited upon us by the cupidity of those who are now the champions of universal emancipation. A firm determination to resist, at the threshold, every invasion of our domestic tranquillity and to preserve our sovereignty and independence as a State is earnestly recommended; and if an appeal to the first principles of the right of self-government be disregarded, and reason be successfully combated by sophistry and error, there would be more glory in forming a rampart with our bodies on the confines of our territory than to be the victims of a successful rebellion or the slaves of a great consolidated government." The officials and Courts of South Carolina continued for over twenty-five years to disregard Judge Johnson's opinion and to insist that the decision in *Gibbons* v. *Ogden* was inapplicable.[1] The whole episode is a striking illustration of the fact that, throughout the long years when the question of the extent of the Federal power over commerce was being tested in numerous cases in the Court, that question was, in the minds of Southerners, simply coincident with the question of the extent of the Federal power over slavery. So the long-continued controversy as to whether Congress had exclusive or concurrent jurisdiction over commerce was not a conflict between theories of government, or between Nationalism and State-Rights, or between

holding that the law belonged strictly to the State's internal police, like a quarantine law, and that "the right of self-protection was not limited to defence against physical pestilence but that a State might protect itself against the introduction amongst its colored people of moral contagion." *Ops. Attys.-Gen.*, II, 426. See also *27th Cong., 3d Sess.*, House Doc. No. 800.

[1] See Chapter XXIV, *infra*.

differing legal construction of the Constitution, but was simply the naked issue of State or Federal control of slavery. It was little wonder, therefore, that the Judges of the Court prior to the Civil War displayed great hesitation in deciding this momentous controversy.

While the States were thus exceedingly concerned over the possible encroachment on their powers as to the subjects of monopoly, of transportation, slavery and internal improvements which lurked in the constitutional doctrines announced in the *Steamboat Case*, they were about to be confronted at this Term of Court with a still more startling invasion of their sovereignty. Exactly one month after the close of the argument in *Gibbons* v. *Ogden* on February 10, 1824, arguments were begun in the great case of *Osborn* v. *Bank of the United States*, which had been pending on the docket for three years, and which presented four questions of the highest importance: the right of the Bank to maintain suit against the officials of a State; the right of the Bank to sue in the Federal Circuit Courts; the power of Congress to charter the Bank; and the power of the State of Ohio to tax the Bank. The second question was also pending in a case before the Court arising in Georgia — a case which added that State to the long list of opponents of the Federal authority. Though the Bank of the United States had no branch in Georgia and hence was not subjected to a State tax, a heated conflict had arisen between it and the State over its policy of requiring State banks to redeem their notes in specie. As a retaliatory measure, Georgia had enacted statutes, in 1819 and 1821, expressly excepting the Bank from rights given to other injured suitors in her Courts, and providing that State bank notes held by the Bank should not be redeemable in specie, unless the person presenting

them would swear that the notes were not procured by the Bank "for the purpose or with any intent to demand or to draw specie from the bank issuing the notes." As a result of this unfair legislation, the effort of the Bank to collect in specie naturally met with open resistance. The largest State bank, the Planters Bank of Georgia, announced, in 1821, that it would cash no more of its notes presented by the Bank of the United States, and stated in a circular that "this mammoth came here to destroy our very substance. Ships, plantations, negroes, wharves, stores, — all the sources of wealth of the State have been devoured by this all-assuming power." In December, 1822, the principles of the Ohio resolutions opposing the *McCulloch Case* decision of the United States Supreme Court had been approved in a debate in the Georgia Legislature, and resolutions were introduced stating that the Bank of the United States "must alter its policy" or "it will encounter the utmost exertion of the power of this State." And in the latter part of 1823, the Georgia Legislature had passed a resolution calling for an Amendment of the Constitution so as to restrict the powers of the Federal Courts. Meanwhile, in a suit by the Bank against the Planters Bank of Georgia, brought in the United States Circuit Court, a defense was raised which, if sustained, might have been almost fatal to the Bank's operations. It was objected that the Circuit Court had no jurisdiction of the case, as there was no requisite diverse citizenship and the provision of the Bank's charter allowing it to sue in the Circuit Court, properly construed, did not permit such suit. Had the point been successfully maintained and the Bank excluded from the Federal Courts and obliged to trust its fate to local juries, its fortunes would have been highly insecure. In

December, 1823, the case accordingly had been certified to the Supreme Court.[1] After the Ohio case had been argued by Charles Hammond and John C. Wright for the State against Henry Clay for the Bank, the Court expressed a wish that it be reargued with this Georgia case, upon the constitutional points raised, as well as upon the effect of the section of the Bank's charter authorizing suit in the Federal Courts.[2] In this second argument, which occurred on March 10 and 11, 1824, a galaxy of counsel took part. The State had retained Robert Goodloe Harper, the talented Maryland lawyer, then fifty-nine years old and famed for his knowledge of commercial law and his keen reasoning powers; Ethan Allen Brown of Ohio, then forty-eight years old, who had been Judge of the Supreme Court and Governor of Ohio; and John C. Wright. For the Bank, there appeared Daniel Webster, then fresh from his triumph in *Gibbons* v. *Ogden* (for this case had been decided in the *interim*, on March 2) and from his recent powerful argument in *Ogden* v. *Saunders* (argued March 3–5); and John Sergeant, the long-time leader of the Philadelphia Bar, then forty-five years old, and the Bank's regular counsel.[3]

[1] See *Niles Register*, XXI, Jan. 25, 1822; XXV, Jan. 10, 24, 1824.

[2] In 1823, the *Western Herald and Steubenville Gazette* (Ohio), said: March 1: "The great cause between the State of Ohio and the United States Bank was expected to have been decided by the Supreme Court at Washington City this present week, Messrs. Wright and Hammond are in attendance as counsel for State and Mr. Clay as counsel for the Bank."

Judge Story had written to Judge Todd on March 14, 1823: "Your friend Clay has argued before us with a good deal of ability, and if he were not a candidate for higher offices, I should think he might attain great eminence at this Bar. But he prefers the fame of popular talents to the steady fame of the Bar." As to Charles Hammond, Chief Justice Marshall, on a trip down the Potomac with William Greene of Cincinnati in 1824, "spoke of his remarkable acuteness and accuracy of mind, and referred with emphatic admiration to his argument in the *Bank Case*. He said that he met no judicial record of equal intellectual power since Lord Hardwicke's time." *History of Ohio* (1912), by Emilius O. Randall and Daniel J. Ryan, III, 329.

[3] "*Osborn* v. *The Bank* was argued with equal zeal and talent, and decided on great deliberation," said Chief Justice Marshall in *Ex parte Madrazo* (1833), 7 Pet. 627.

Only one week later, on March 19, 1824, the decision was rendered by Chief Justice Marshall upholding the Bank in all its contentions and reaffirming *McCulloch* v. *Maryland* as to the constitutionality of the Bank's charter and the invalidity of the State tax law. This action of the Court had been generally expected. But the further rulings proclaimed a new doctrine in constitutional law, when the Court held that a State officer who had committed a trespass, relying on an unconstitutional State statute, might be sued in spite of his official position; that Ohio's contention that the suit against Osborn was a case in which the State was a party and hence barred by the provisions of the Eleventh Amendment was untenable; and that the State officials must return to the Bank the tax money taken from it.[1] By this fateful decision, the narrow limits to the power of the Federal Courts so strenuously urged by the State-Rights men were overthrown and demolished. Rendered at a time when attacks in Congress upon the Court and its jurisdiction were becoming increasingly frequent, and when threats of resistance to Federal protective tariff laws and to decrees of Federal Courts in relation to State negro legislation were being heard in various States, the decision constituted another firm bulwark to the Union. That these conditions of the time were clearly in the mind of the Court was apparent from the ringing words employed by the Chief Justice in maintaining the power of the Nation to protect its agents in executing its laws and to restrain or commit State officials who sought to obstruct the authority of the National Government. Judge Johnson also, though dissenting on a technical point, pointed out that "a state of things has now

[1] See especially *Osborn* v. *The Bank*, by Daniel H. Chamberlain, *Harv. Law Rev.* (1887), I; *The State as a Defendant under the Federal Constitution*, by William C. Coleman, *ibid.* (1917), XXXI.

grown up in some of the States which renders all the protection necessary that the General Government can give to this Bank."

To those who favored a strong Union, the decision was a source of great satisfaction, but to the ardent State-Rights advocates it afforded only more fuel to their opposition to the Court. "The opinion of the Court goes far beyond any heretofore given, as to the reduction of the State Sovereignty, and will, it is apprehended, give much cause of alarm to the friends of republican principles and of the rights of the people," said a leading Ohio paper; and a Kentucky paper said that the decision repealed the Eleventh Amendment, "for if Federal Courts can punish State officers for official acts, and take money from the State Treasurer, their exemption from suits is a mere mockery." [1]

[1] See *New England Palladium* (Boston), March 30, 1824; *Western Herald and Steubenville Gazette*, March 27, 1824; *Argus of Western America*, April 7, 1824.

CHAPTER SIXTEEN

KENTUCKY AGAINST THE COURT

1821–1825

It will be noticed that during the years from 1819 to 1824, the criticisms of the Court, outside of Virginia and Ohio, had come largely from Kentucky politicians and newspapers, and (as will be described in a later chapter) the most serious attempt made in Congress to weaken the Court's power originated with Kentucky Senators and Representatives. "To the mass of democracy, it would be grateful to see the Judges rendered dependent on the will of the National Legislature and to the inhabitants of Kentucky and other new portions of the Union peculiarly acceptable," wrote Pickering to Richard Peters in 1810.[1] This attitude on the part of Kentucky was reflected in the support which it was destined to give to Jackson and the Democratic Party, as opposed to Clay, Adams and those who were supposed to favor Chief Justice Marshall's principles of constitutional construction; and thus the Court became in that State a distinct factor in political history.

There were three local causes for the intensity of feeling which Kentucky displayed on the subject of judicial power; for that power had been exercised in setting aside the assertion of State control in four vital classes of subjects. The Federal Courts had insisted on their jurisdiction in admiralty over Kentucky's inland waters;

[1] *Peters Papers MSS*, letter of Pickering, Jan. 1, 1810; "In all suits respecting lands where non-residents are parties they deprecate the intervention of an able and impartial Judiciary."

they had declared the invalidity of Kentucky's laws protecting settlers who had made improvements on disputed land patents; they had disregarded Kentucky's laws passed for the protection of judgment debtors; and they had sustained the rights of the obnoxious Bank of the United States. In all these instances, the Federal Courts had run counter to tides of intense State sentiment; and nowhere in the United States had the feeling of hostility thus aroused been so generally entertained by the whole people of the State.

Of the four "usurpations" by the Federal Courts, the one of least importance may be noted first — the extensive admiralty jurisdiction claimed by the United States District Court in inland waters, which had been feared and resented by the States bordering on the Ohio and Mississippi Rivers. Cases involving mechanics' repairs, sales of supplies and seamen's wages on river-boats had been brought in large numbers in the Federal Courts, owing to the fact that a trial by jury was thus avoided, and the Federal executions required payment in gold (the State Courts allowing payment in paper and subject to stay-laws). The assumption of jurisdiction in these cases had aroused much feeling against this increase of Federal power.[1] In 1821, the action of the District Court in Kentucky had been the subject of attack in Congress by Senator Richard M. Johnson, who said that: "It was a new era in the history of our country; for Kentucky was about to learn from the exercise of admiralty jurisdiction that she was a maritime State"; that if this jurisdiction was confirmed, the Federal Courts in Kentucky would at one step double their jurisdiction, and that "the people never can and never will submit to this extraordinary assumption of admi-

[1] See *Kentucky Gazette*, July 5, 1821. See also *Niles Register*, XVII, Sept. 11, 1819, giving an account of a case upholding admiralty jurisdiction on the United States District Court for the Western District of Pennsylvania.

ralty jurisdiction . . . the most serious encroachment upon the constitutional jurisdiction of the State tribunals and the most dangerous inroad upon State sovereignty." He urged that, though steamboat navigation had produced a new epoch in the interior navigation of the country, those who engaged in such navigation would be ruined if subjected to the processes of Federal Admiralty Courts, and that the people could not be governed by two systems of law — "one maritime, and the other the statute laws of the State — one demanding the pound of flesh, the other extending these charities of the law. . . . Such a system has the most powerful tendency to lessen confidence in the Federal Judiciary and to generate in the minds of the people the most inveterate hatred towards that essential arm of the General Government." Johnson's bill to confine admiralty jurisdiction to places within the ebb and flow of the tide and on the high seas was passed in the Senate in 1822, but failed in the House.[1] Each of the three succeeding years, however, witnessed strong criticisms in Congress on this unwarranted extension of admiralty jurisdiction, and the hostile feeling did not subside until 1825, when the Court, through Judge Story, relieved the situation by deciding, in *The Thomas Jefferson*, 10 Wheat. 428, that admiralty jurisdiction did not extend beyond the ebb and flow of the tide.[2]

[1] *17th Cong., 1st Sess.*, Dec. 28, 1821, Feb. 13, March 15, 1822; *17th Cong., 2d Sess.*, Feb. 15, 1823. In the House, the bill was opposed by J. S. Johnston of Louisiana who thought that the matter should be left to the decision of the Supreme Court. J. S. Johnson of Kentucky favored the bill, and argued that if the Courts had jurisdiction on interior rivers, they might also take jurisdiction on the Erie Canal and on the Canal systems throughout the country. "The more we reflect upon this subject, the more we will be alarmed at this mighty power. . . . Shall we sanction that doctrine which makes necessity the arbiter of constitutional law, convenience and necessity?"

[2] Judge Story had been extremely liberal hitherto in construing the extent of admiralty jurisdiction, so far as related to its subject matter. In 1815, in *De Lovio* v. *Boit*, 2 Gallison, 398, he had held marine insurance policies to be subject to that jurisdiction — "the broad pretension for the Admiralty set up, under which the legal

Far more dangerous opposition to the Federal Courts had meanwhile been aroused by their decisions on the subject of the Kentucky land laws. For many years, Kentucky had been the scene of complicated and troublesome controversies over the desperate condition of her land titles, as a result of the innumerable surveys and patents of land which frequently overlapped each other.[1] The State in order to mitigate this situation had enacted laws, providing that no claimant should be awarded possession of land to which he proved title, unless he should compensate the occupier for all improvements, and that, in default thereof, the title should rest in the occupier upon paying the value of the land without improvements. The validity of these laws had been at once attacked in the Courts of the State, but they had in general been upheld. Grave fears, however, were entertained by Kentuckians lest the United States District Court should hold otherwise. Senator John Breckenridge, in drafting the Circuit Court Act of 1802, was bombarded with demands from his constituents to restrict the jurisdiction of the Federal Courts, by abolishing suits based on diverse citizenship, so as to eliminate the possibility of the validity of the land laws being tested by non-residents in these Courts.[2] As early as 1804, the Legislature had passed a resolution reciting that: "The artful and wealthy land-claimant who is an inhabitant of this State, by a transfer of title to a non-resident, may give jurisdiction . . . and thereby put it out of the power

profession and this Court staggered for thirty years before being able to maintain it," as Judge Campbell said in *Jackson* v. *Steamboat Magnolia*, 20 How. 296, in 1858. See also *The General Smith*, 4 Wheat. 438, in 1819, and the dissenting opinion of Judge Johnson in *Ramsey* v. *Allegre*, 12 Wheat. 611, in 1827, and letter of Marshall to Story, June 25, 1831, *Mass. Hist. Soc. Proc., 2d Series*, XIV.

[1] See *Kentucky's Contributions to Jurisprudence*, by Judge Henry Burnett, *Kentucky State Bar Ass.* (1909); *Land Titles in Kentucky, ibid.;* speeches of W. P. Mangum and C. A Wickliffe, *19th Cong., 1st Sess.*, 931, 946, Jan. 10, 11, 1826.

[2] See *supra*, I, 219–221.

of his indigent opponent to pursue or support his claim with success. This is evident when we recollect the great distance which many of our citizens live from the District Court of the United States and their inability to prosecute an appeal at the Federal City. . . . Serious and alarming consequences may ensue from contradictory adjudications in the Supreme Federal Court and the Court of Appeals of the State. The Judiciary of each State ought to be considered best qualified to decide upon its law." The Legislature accordingly advocated an Amendment to the Federal Constitution, confining judicial power to cases arising under the Constitution and laws of the United States. Fifteen years later, in 1819, the constitutionality of its land-claimant laws was contested in the United States Circuit Court, on the ground that they constituted an impairment of the obligation of a contract which had been entered into between Virginia and Kentucky when the latter became a State in 1791, providing that all private rights and interests within Kentucky should "remain valid and secure" and should be determined by the then existing laws of Virginia. Violation of this contract was hotly denied by Kentucky and by the innocent occupiers of land. The case, *Green* v. *Biddle*, finally reached the Supreme Court for argument in 1821, and on March 8, that Court, through Judge Story, rendered a decision holding the laws unconstitutional. Kentucky was at once set aflame with resentment. "It is a fact which we have noticed, and our readers must have remarked the same of late," said a leading newspaper, "that at almost every session of the Court, the laws of the States are treated in a manner that does no credit, either to the motives or understanding of our State Legislatures. The Supreme Court of the United States is the proper tribunal to settle *some* disputed cases,

and it must be submitted to; but the principles upon which it has recently acted are so broad, that it begins to look like the old iron bedstead that accommodated every person by stretching or lopping off a limb." "The slow encroachments and gradual usurpation of the Judiciary, facilitated by the irresponsible tenure of their office, are more dangerous to the liberties of the people and the right of the States, than Congress and the President with the army and navy at their command."[1] In October, 1821, the Legislature met and passed a resolution calling the decision "incompatible with the constitutional powers of this State", and protesting against the power of the Court, in very much the same language used by the Legislature of Ohio, in the preceding year, in the latter's attack on the decision of *McCulloch* v. *Maryland*.[2] Henry Clay having been directed by the State to ask for a reargument, the case was argued for a second time in 1822.[3] As the Court had beeen warned by Clay in his argument that the power to pass on the validity of State statutes was one to be exercised "with the most deliberate caution", and that the success of the experiment of government by written Constitution "depends upon the prudence with which this high trust is executed", and as the Court was thoroughly alive to the seriousness of the adverse sentiments which had been aroused towards the Judiciary in Ohio, Virginia, Maryland,

[1] *Kentucky Gazette*, March 29, 1821, Dec. 26, 1822. See also editorial in *Argus of Western America*, March 22, 1821. It is to be noted that this decision was rendered only five days after the decision in the *Cohens Case;* see editorial in *Niles Register*, March 17, 1821.

[2] *Niles Register*, XXI, Feb. 23, 1822; *National Intelligencer*, Feb. 20, 1822; *State Documents on Federal Relations* (1911), by Herman V. Ames.

[3] *Niles Register*, XX, March 17, 1821, Clay and Bibb were requested to oppose the Court's decision, "in such manner as they may deem most respectful to the Court and consistent with the dignity of the State." The second argument by Thomas Montgomery and Benjamin Hardin against Henry Clay and George M. Bibb, occupied six days, March 7–13, 1822.

Kentucky and other States, it held the case under consideration for a full year; but on February 27, 1823, it rendered its final decision, adhering to its former view, and again holding these Kentucky statutes to be unconstitutional. How desirous it had been of upholding their validity, if it could have conscientiously done so, was seen from the remarks of Judge Bushrod Washington, who wrote the opinion: "We hold ourselves answerable to God, our consciences and our country, to decide this question according to the dictates of our best judgment, be the consequences of the decision what they may. If we have ventured to entertain a wish as to the result of the investigation which we have laboriously given to the case, it was that it might be favorable to the validity of the laws; our feeling being always on that side of the question unless the objections to them are fairly and clearly made out." And Judge Story, in a letter to Judge Todd (the Kentucky member of the Supreme Court who was ill this Term of Court), spoke of the "tough business" before the Court and of the solicitude which he had felt over the Kentucky cases:[1]

> We have missed you exceedingly during this Term, and particularly in the Kentucky causes, many of which have been continued, solely on account of your absence. God grant that your health may be restored and that you may join us next year. Poor Livingston has been very ill of a peripneumony and is still very ill; whether he will ever recover is doubtful. . . . Judge Washington has also been quite sick and was absent for a fortnight. He is now recovered. The Chief Justice has been somewhat indisposed; so that we have been a crippled Court. Nevertheless, we have had a great deal of business to do; and as you will see by the Reports, tough business. We wanted your firm vote on many occasions. Your friend Clay has argued before us

[1] *Green* v. *Biddle*, 8 Wheat. 1; *Story*, I, 422, letter of March 14, 1823.

with a good deal of ability; and if he were not a candidate for higher offices, I should think he might attain great eminence at this Bar. But he prefers the fame of popular talents to the steady fame of the Bar. . . . The Occupying Claimant Law has at last been definitely settled after many struggles. I see no reason to take back our opinion, though, for one, I felt a solicitude to come to that result, if I could have done it according to my views of great principles. I could not change my opinion, and I have adhered to it.

The antagonism excited by this decision was heightened by reports as to the manner in which it was rendered, for statements were current that it had been concurred in by less than a majority of the members of the Court. "Three out of seven Judges constituting the Court declared our laws unconstitutional," so stated a Kentucky paper. "Marshall refused to sit. Johnson expressly dissented. Todd was prevented by ill health from leaving home and Livingston was sick. Thus three men, a minority of the Judges, have prostrated a system of laws which has been thought essential to their prosperity by almost half a million people constituting an independent State. *Independent*, do we say? Scarcely has Kentucky a sovereign power left!" [1] Although it became known later that the three absent Judges agreed with the decision,[2] the halls

[1] See also letter of Senator Rowan to Governor John Adair describing the efforts to secure a re-hearing, which was denied by Judges Washington, Duval and Story, in *Western Monitor*, May 6, 1823. The *Argus of Western America* said, May 12, 1824: "Kentucky has felt a shock more tremendous than the dreadful earthquake, in the destruction of her occupying claimant laws." *Works of Henry Clay* (1897), IV, letter of Clay to Francis Brooke, March 9, 1823: "The dissatisfaction which will be felt by the people of Kentucky with the decision will be aggravated, in no little degree, by the fact that the decision is that of three Judges to one, a minority therefore, of the whole Court."

[2] *19th Cong., 1st Sess.*, Jan. 6, 1826. Congressman Mercer stated as to *Green* v. *Biddle*, 903: "I well know and here affirm on unquestionable authority that one of the absent Judges, now in his silent but honored grave and then confined by sickness, concurred in the sentence of the Court, and another of those Judges was withheld from expression of his opinion, by its coincidence with that of the Court, and delicacy only. He had near relatives deeply interested in that judgment. Had it met his disapprobation, no moral or judicial propriety would have restrained him from

of Congress rang with assaults upon the "minority opinion." When the Kentucky Legislature met in December, 1823, resolutions were adopted, solemnly protesting the "doctrines promulgated in that decision as ruinous in their practical effects to the good people of this Commonwealth and subversive of their dearest and most valuable political rights"; the Governor in his speech to the Legislature said that the decision degraded the sovereignty of the State; and a memorial of protest was drawn up and presented to Congress urging changes in the Federal judicial system.[1] As a result of these official proceedings, bills were introduced into Congress and vigorously supported by the Kentucky Senators and Representatives, providing for radical abrogation of the powers of the Court, either through the entire repeal of the Court's appellate jurisdiction, or through a requirement of a concurrence of all, or of five, of the seven Judges, in constitutional cases.

As a curious commentary on the local nature of the doctrine of State-Rights, it may be noted that though Kentucky, in thus arraying herself against the "encroachments of the Federal Judiciary", was but following the position taken and arguments advanced by Virginia after the *Cohens Case*, in 1819, Virginia now was heartily supporting the decision of the Court in

saying so, and every principle of justice would have permitted, if it had not more earnestly prompted, the avowal of his opinion. The sentence of the Court, therefore, which has produced, I admit, much suffering, and excited, very naturally, much discontent, expressed the opinion, not of three, but of five Judges, and I believe of every Judge of that Court but one." In *Bronson* v. *Kinzie*, 1 How. 317, it is said that: "This judgment of the Court is entitled to the more weight, because the opinion is stated in the report of the case to have been unanimous, and Judge Washington, who was the only member of the Court absent at the first argument, delivered the opinion of the second."

[1] *Niles Register*, XXV, Nov. 8, 29, Dec. 27, 1823, Jan. 2, 1824.

The Kentucky State Court refused to be bound by the United States Supreme Court decision, and hence it could be enforced only in the inferior Federal Courts; see *Bodley* v. *Gaither*, 3 T. B. Monroe, 57, in 1825; *Fisher* v. *Cockrell*, 5 Peters, 248; *Niles Register*, XXI, Dec. 30, 1826; *Gaines* v. *Buford*, 1 Dana, 481, in 1833; *Shepherd* v. *McIntire*, 5 Dana, 574, in 1837.

Green v. *Biddle*. Thus again, it was made plain that State opposition to judicial action depended, not so much on the political theory held by the States, as on the particular interest aided or injured. With much reason did Henry Clay write to a friend in Virginia: "Has not Virginia exposed herself to the imputation of selfishness by the course of her conduct or of that of many of her politicians? When, in the case of *Cohens* v. *Virginia*, her authority was alone concerned, she made the most strenuous efforts against the exercise of that power by the Supreme Court. But when the thunders of that Court were directed against poor Kentucky, in vain did she invoke Virginian aid. The Supreme Court, it was imagined, would decide on the side of supposed interests of Virginia. It has so decided; and, in effect, cripples the sovereign power of the State of Kentucky more than any other measure ever affected the independence of any State in the Union; and not a Virginia voice is heard against this decision." [1]

Just at this time, when hostility towards the Federal Judiciary was at its height among the occupiers of land in Kentucky, the Federal Courts again became a storm-center, by reason of the decisions rendered, in 1825, in connection with that bugbear of the South, the Bank of the United States. "I have long entertained the opinion," said a writer in a leading Kentucky paper in 1824, "that the Bank of the United States was the chief cause of all the aggressions upon the sovereignty of the

[1] *Works of Henry Clay* (1897), IV, letter to Francis Brooke, Aug. 28, 1823. The *National Intelligencer*, Feb. 18, 1822, said: "The people of Virginia already feel that if the Judiciary of the United States sometimes decides against their interests, it is, at others, the sure palladium of their rights. At this moment, they look up to it for protection against the adjudication of the State Courts of Kentucky." The *Richmond Enquirer* said, January 22, 1822, referring to a resolution of the Kentucky Legislature, that only "the most imperious necessity should justify such a resort" to resistance by force. Yet only the year before, the *Richmond Enquirer* had been most vigorous in counseling resistance to the Court in the *Cohens Case*.

States and the rights of the people which have proceeded from the Federal authorities. . . . I have seen the Bank leaning on the judicial arm, which not only awards to the corporation all she claims but seeks every occasion to humble the States. . . . If the doctrine for which the Bank contends in those cases prevails, not only will Kentucky be degraded, but the sovereignty of every State in the Union will be prostrate in the dust." [1] The "doctrine" so savagely referred to as contended for in the Bank cases was the simple doctrine of honesty, good faith and sanctity of contract on the part of the State; and its reaffirmation by the Federal Courts had been made necessary by the business and political conditions prevailing in the Southwest. When, in the *McCulloch Case* in 1819, and in the *Osborn Case* in 1824, the Court had denied the power of the States to tax the Bank of the United States, the financial situation became serious; for the States had been relying on a policy of chartering State banks with an almost unlimited issue of paper currency, and these weak and numerous creations could not withstand the competition of a strong National banking institution. "We are in the West in a terrible condition with our currency," wrote Henry Clay to Caesar A. Rodney, "of which there is but little prospect of its speedy melioration. The effect from it which I most apprehend is collision with the Federal authority." [2] This collision so predicted was soon to be brought about in connection again with the Bank of the United States, for it was to that institution, instead of to their own rotten State financial policy, that the people and the newspapers attributed all their woes. In order to relieve the distressed situation of its debtors, Kentucky

[1] *Argus of Western America*, May 12, 1824.
[2] *Caesar A. Rodney Papers MSS*, letter of Aug. 9, 1821.

had determined upon a radical course of action and, in 1821, it passed four remedial acts. The first abolished all imprisonment for debt (Kentucky thus being the first State in the Union to do away with the old and barbarous methods of imprisoning insolvent debtors); a second act provided that real estate of a debtor should not be sold on execution for less than three quarters of the appraised value; a third incorporated the Bank of the Commonwealth with power to issue notes not required to be redeemable in specie; and the fourth, a "stay"-law, prevented creditors to whom debtors had given bond with security from levying their executions for a period of two years, unless the creditor should indorse on his execution his willingness to accept in payment of his judgment notes on the Bank of Kentucky or the Bank of the Commonwealth. This legislation, thus enabling debtors to pay their debts in a depreciated currency, and sweeping away the creditors' rights to take property on execution, and compelling them to receive payment of less than the amount of their debts or incur the hazards of indefinite and vexatious delays, applied to all past as well as to future loans. There would seem to be no clearer instance of laws directly impairing contract rights; and the Bank of the United States, as well as other creditors, were determined to contest their validity in both the State and Federal Courts. Though the temper of the people was such that actual threats of personal violence were made against any Judge who should dare to set this legislation aside, and vehement pressure was brought to force the State Judges to bow to the popular will, both Judges of the inferior Courts and of the Kentucky Court of Appeals, in 1822, displayed their courage, integrity and independence by holding that they were bound to follow the law as laid down by the United States Supreme

Court in *Sturges* v. *Crowninshield*, four years before, and to declare the State laws to be violative of the Constitution of the United States and therefore invalid.[1] "Although there are some decisions of the Supreme Court which I could wish were otherwise," said Judge Benjamin Miller, "yet I do not perceive the danger of encroachment and usurpation so loudly sounded; and until I do, I cannot be foremost in volunteering in opposition to a government — the most happy and just, known in the world." This decision aroused a furious outcry against the State Judges. They were denounced as usurpers, tyrants and kings, and their authority or power to destroy a legislative act by declaring it to be unconstitutional was denounced on all sides. The Legislature adopted resolutions, practically echoing the sentiments of the Ohio resolutions of two years before, and denying the power of the Judges to overrule the sovereignty of the State as expressed in the acts of the Legislature, and urging that the statutes should be enforced regardless of the opinion of the Court.[2] After making an unsuccessful attempt

[1] *Blair* v. *Williams, Lapsley* v. *Brashears*, 4 Littell, 34, 47, 64. In Tennessee, a similar decision had been rendered as early as 1821, holding a stay-law invalid, *Townsend* v. *Townsend*, 7 Tenn. 1. In Georgia, in 1815, when the Judges of the Superior Court had been sturdy enough to declare unconstitutional a stay-law, enacted in aid of the debtor class and to the delay and oppression of creditors, the Legislature passed a resolution denouncing and protesting against this action of the Judges, and asserting that the extraordinary power of determining upon the constitutionality of laws regularly passed by the Legislature was not vested in the Judiciary and would not be yielded by the Legislature. See also letter of Thomas Jefferson to W. H. Torrance, June 11, 1815, approving this resolution. *Jefferson*, IX. *Niles Register*, XXI, said, Sept. 15, 1821, that the Tennessee law was undoubtedly invalid, "together with all its kindred acts in other States, which have a tendency to violate the obligation of contracts."

[2] "Further resolved that this Legislature, as the first measure to avoid the degradation and oppression inflicted by that opinion upon the State of Kentucky, will present to the Congress of the United States a temperate but firm remonstrance against its doctrines, and thereupon call upon the Nation to guarantee to the State its Republican form of government, and its co-equal sovereignty with the States which compose this Union." "Resolved that any effort which the Legislature may find it a duty to make, for contravention of the erroneous doctrine of that decision, ought not to interfere with or obstruct the administration of justice according

to remove the Judges by impeachment, the Legislature took the further radical step of abolishing the existing Court of Appeals, in 1824, and establishing an entirely new Court to which the Governor appointed men known to be supporters of the debtor-relief laws.[1]

But while temporarily evading the force of judicial decisions which they deemed obnoxious, by this expedient of abolishing the State Court, the people of Kentucky could not so easily dispose of the questions involved when they arose in the Federal Courts. For while these stay and replevin laws, regulating as they did the manner of enforcing judgments and writs of execution, might be recognized as binding in such State Courts as chose to hold them valid, they were not necessarily binding upon the Courts of the United States, and Judge Trimble in the Circuit Court of Kentucky had already held them to be invalid.[2] Moreover, acting under the Federal Process Act of 1792, the Federal Judges in Kentucky had adopted Rules of Court regulating process in their own Courts, directing that judgments should be discharged only by payment in gold and silver, and restricting the right of debtors to reclaim their property seized on execution. It followed that whenever a plaintiff was capable of suing in the Federal Court, that is, if he were a non-resident creditor or the Bank of the United States (which by Act of Congress was entitled so to sue), he was enabled to secure

to existing laws which, whether they were or were not expedient, are believed to be constitutional and valid, and which should, when it shall be thought expedient to do so, be repealed by the Legislature and not by the appellate Court."

[1] This New Court secured possession of the records by force, and heard and decided fifty-two cases in the Spring Term of 1825 (see 2 T. B. Monroe). In 1826 an act restoring the Old Court was passed by the Legislature over the Governor's veto, and in 1829, the Court in *Hildreth's Heirs* v. *McIntire's Devisee*, 1 J. J. Marshall, 206, declared null and void all proceedings of the New Court. See also *Stark's Admr.* v. *Thompson* (1830), 3 J. J. Marshall, 299.

[2] See editorial in *Kentucky Gazette*, July 12, 1821, attacking Judge Trimble, warning him of the fate of Judge Samuel Chase, and deploring the interference of the Federal Judges with the State execution laws.

payment of his judgment debts in gold or silver. Kentucky creditors, on the other hand, being obliged to sue in the State Courts found that under the State laws they must be content with payment in paper and extension of the debtor's rights to replevy. It was entirely natural that the people of Kentucky should feel outraged at this situation, and that they should denounce the right of the Federal Courts to disregard the State laws or to adopt Rules of Court regulating judgments and executions, in derogation of the State authority, and that they should warmly applaud the violent speech in Congress of their Senator, who stated that these Courts had "turned Kentucky over, a prey to the Bank and the mercenary vultures that hovered round that institution." [1] On the other hand, newspapers in the East applauded the "firmness and decision" of the Judges and were "rejoiced to find the Judiciary in various States interposing to defeat the unconstitutional and pernicious laws of their Legislatures impairing the obligations of contract. . . . These opinions . . . must, in time, have considerable effect in correcting the wild notions and unfortunate feelings which exist in the West concerning banks and debts and the omnipotence of State Legislatures." [2]

To test the power of the inferior Federal Courts to require the levying of executions in a manner other than that prescribed by the laws of Kentucky, three cases were quickly brought before the Supreme Court from the Circuit Court of the United States in Kentucky. While the State was anxious to obtain a decision on this point, the Bank of the United States was equally anxious to obtain the opinion of the Court as to the constitutionality of the State stay and replevin laws —

[1] *20th Cong., 1st Sess.*, Feb. 21, 1828, speech by Senator Rowan.
[2] *Franklin Gazette* (Pa.), quoted in *Richmond Enquirer*, July 27, 1821.

an opinion which there had hitherto been no possible means of obtaining by writ of error from the State Court of Appeals, since that Court had itself held the laws invalid. These cases of *Wayman* v. *Southard*, *Bank of the United States* v. *Halstead* and *Bank of the United States* v. *January*, 10 Wheat. 1, came before the Court for argument first in March, 1824, John Sergeant, the Bank's chief counsel and head of the Pennsylvania Bar, and Langdon Cheves, its former president and a leader of the South Carolina Bar, appearing for the Bank against George M. Bibb and Benjamin M. Munroe, of Kentucky.[1] As the Court, however, at this 1824 Term had already decided the *Osborn Case* against the contentions of Ohio and the *Steamboat Monopoly Case* against the contentions of New York, and had heard the argument in *Ogden* v. *Saunders*, in which it had been asked to overthrow the bankrupt laws of all the States, it was loath to set aside these Kentucky stay-laws, and consequently it rendered no decision at this Term. The next year, nevertheless, on February 12 and 15, 1825, it announced a decision which, though cleverly avoiding a conclusion as to the constitutionality of the stay and replevin laws, dealt quite as severe a blow to the debtor interests of Kentucky; for it held that the Federal Courts had the power to regulate their own processes by their own Rules of Court, that as no State had the power to regulate the processes of the Federal Courts, the State laws relative to executions, replevy of property sold to satisfy judgment, etc., were not binding upon such Courts, and, therefore, "if the laws do not apply to the Federal Courts, no question concerning their constitutionality can arise in those Courts." The result of this decision, of course, was that the Bank and any creditor

[1] "The question is interesting to the Western country as well as to the merchants of the seaboard who have given credit to Western traders." *New York Statesman*, Feb. 24, March 18, 1824. See also *Lexington Gazette* (Ky.), April 18, 1824.

who was not a citizen of Kentucky could escape the restrictions of the State laws by suing in the Federal Courts, and thus the State laws which had been enacted chiefly for the purpose of attacking the obnoxious Bank were rendered of no avail. As soon as this decision was rendered, the people of the State rose in wrath.[1] "Blow after blow, first by the Supreme Court, then by our Court of Appeals, then by the Supreme Court again," said a Kentucky paper, "has been aimed at the power of our Legislature — so that unless those tribunals are effectually checked, nothing will shortly be left to distinguish us from the subjects of Eastern monarchs who are not allowed to have any voice in the making of laws for their own government." "This decision," it said, "carries judicial power a step beyond any conception which we hitherto entertained of it. . . . By this principle, the people are to be subjected to two systems of execution laws, one springing from their own Legislature, and the other from the Federal Courts. . . . They assume to do what Congress never dared to do, to pass a system of execution laws independent of the States. Shall we suffer Judges to assume a power for the exercise of which we would instantly turn out our representatives? They would not dare it, were they not confident of security in life office. But they may be reached."[2] In July, 1825, a great popular meeting was held at which resolutions were passed to the effect that the Constitution did not authorize the Courts to alter the regulation of legal processes by the Court, and

[1] In a review of *Kent's Commentaries* by Willard Phillips in *North American Review* (1827), XXIV, it was said: "The decision in *Wayman* v. *Southard*, on one of the Kentucky 'Stop Laws' in relief of debtors, and some other decisions of the Supreme Court, have given great dissatisfaction to some of the people of Kentucky and provoked much virulent declamation against the Court itself. During the late session of Congress, some member intimated that a judicial tyranny was secretly creeping in upon us."

[2] *Argus of Western America*, June 29, July 13, 1825.

advising resistance. The Kentucky Legislature demanded changes in the Federal judicial system and in the Supreme Court; and the House of Representatives took the serious action of calling on the Governor to inform them "of the mode deemed most advisable, in the opinion of the Executive, to refuse obedience to the decisions and mandates of the Supreme Court of the United States considered erroneous and unconstitutional, and whether, in the opinion of the Executive, it may be advisable to call forth the physical power of the State to resist the execution of the decisions of the Court, or in what manner the mandates of said Court should be met by disobedience." Kentucky was thus brought to the verge of open rebellion against the Court. Other Southern States which had similar stay-laws viewed the doctrine laid down by the Federal Judiciary with grave apprehension, and (as will be seen in the next chapter), the movement for Judiciary reform grew strong in Congress.[1] Eventually, however, as financial conditions improved, and as the practical injustice produced by a false sympathy for debtors became more

[1] *Niles Register*, XXIX, Dec. 10, 1825, 228–229; *State Documents on Federal Relations* (1911), by Herman V. Ames; *Letters on the Condition of Kentucky in 1825* (1916), by Earl G. Swem; *Louisville Public Advertiser*, March 26, 1825; *19th Cong., 1st Sess.*, speech of Bates of Kentucky, in the House, May 12, 1826.

Congress by the Act of May 19, 1828, enacted a new Process Law making existing State process law binding upon the Federal Courts, with power to alter the same in the future; see *Ross* v. *Duval* (1839), 13 Pet. 45. The Kentucky Senators opposed this law, saying that "any measure which should directly or indirectly sustain the power of the Judges of the Federal Courts as now exercised in Kentucky, operated to sanction the principle of tyranny and oppression which caused the separation of this country from Great Britain"; and they moved the enactment of legislation to take away all such power from the Federal Courts. *20th Cong., 1st Sess.*, speeches of Senator Rowan and Senator Johnson, Jan. 20, Feb. 13, 21, 1828. See also *Argus of Western America*, June 22, July 13, 1825. On the general subject, see *Stay and Exemption Laws*, by Isaac S. Sharp, *American Law Register*, N. S. (1872), XI, 201; *Homestead and Exemption Laws of the Southern States, ibid.* (1871), X, 137; *Final Process in the Courts of the United States as Affected by State Laws, Amer. Law Rev.*, I, 23; *Stay and Appraisement Legislation*, by Harold Preston, *Washington State Bar Ass.* (1891); see also especially *Coffman* v. *Bank of Kentucky* (1866), 40 Miss. 29; *Aycock* v. *Martin* (1867), 37 Ga. 124.

evident, the public veered round to the belief that relief statutes such as had been enacted were demoralizing and impolitic. Nevertheless, the hostility to the Federal Courts remained as an active factor in political life in Kentucky for many years.[1]

[1] Webster wrote to Jeremiah Mason, March 20, 1828: "If Barry should succeed by a strong vote, I should give up Kentucky and with Kentucky all hope of Adams' re-election." *Letters of Daniel Webster* (1902), ed. by C. H. Van Tyne. Barry was a strong supporter of the Kentucky stay-laws.

NOTE. As to the Admiralty decision in *The Thomas Jefferson* (p. 635 *supra*), comments by Judges at a later date show that they did not know the history or realize the excited conditions of the times which gave rise to the decision, and, therefore, the decision was wrongly explained. Thus, Judge Miller said in *Hine* v. *Trevor* (4 Wallace, 555), in 1867: "This Court seems not to have been impressed with the importance of the principle it was called upon to decide, as, indeed, no one could then anticipate the immense interests to arise in future, which, by the rulings in that case, were turned away from the forum of the Federal Courts. Apparently, without much consideration — certainly without anything like the cogent argument and ample illustration which the subject since received here — the Court declared that no Act of Congress had conferred admiralty jurisdiction in cases arising above the ebb and flow of the tide." Chief Justice Taney in *The Genesee Chief* (12 Howard, 456), in 1851, spoke of the *Thomas Jefferson* decision, as made "when the great importance of the question as it now presents itself could not be foreseen and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided. For the decision was made in 1825, when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance and but little regard compared with that of the present day."

As to the prevalence of stay laws in the Courts, see references to a case involving the validity of the Tennessee law in the United States Circuit Court at Nashville, and to Judge Trimble's decision as to the Kentucky stay law in *Richmond Enquirer*, July 3, 13, 27, 1821 (quoting *Franklin Gazette* that "the opinions of such a man must, in time, have considerable effect in correcting the wild notions and unfortunate feelings which exist in the West concerning banks and debts and the omnipotence of State Legislature").

CHAPTER SEVENTEEN

JUDICIARY REFORM

1821–1826

While the decade since the War of 1812 had been marked by a growing antagonism against the Court in States whose commercial and financial policies and legislation had been affected by its decisions, practical expression of this sentiment had been confined to agitation in the press and to the passage of resolutions in State Legislatures. No actual move towards curtailment or abrogation of the powers and functions of the Court was made until the year 1821, when there was initiated in Congress the first of a series of Legislative attacks lasting through the next ten years. The grounds of opposition to the Court were diverse in their nature. Throughout the South, and principally in the Republican Party, there was a fear of a consolidated government by extension of Congressional power through a broad judicial interpretation of the Constitution; consequently, attacks on the Court based on such a fear were directed at its course in holding Federal legislation constitutional, and were not in any wise evoked by the possibility of judicial decisions limiting or invalidating Federal power. It was this phase of the Court's activities which had created such alarm in Jefferson's mind. The other and quite distinct source of opposition to the Court was the increasing number of instances in which it had come in

conflict with alleged sovereign rights of the States and had been obliged to hold State legislation invalid. Attacks based on this latter ground were not confined to any particular section or party, but were vigorous in Northern as well as Southern States and among the Federalists as well as the Republicans. By the end of the year 1825, the Court had held unconstitutional the laws of ten States — Georgia, Virginia, New Hampshire, New Jersey, Vermont, Maryland, New York, Pennsylvania, Ohio and Kentucky ; and in each instance its decision had aroused resentment in the particular community whose political tenet or whose financial or commercial or social policy had been affected.[1] The remedies proposed by those who wished to curb the powers and jurisdiction of the Court were varied. Jefferson, fearing more especially the tendency of the Court to uphold extension of Federal authority by Congress, believed that the remedy lay first in requiring every Judge to deliver a separate opinion so that he might be held responsible for his views individually. Though he believed that impeachment was "an impracticable thing", "a mere scarecrow", a "bugbear" which the Judges "fear not at all", Jefferson considered that a practice (which he erroneously claimed originated with Chief Justice Marshall) had rendered impeachment even less feasible than it otherwise might be, namely, Marshall's "habit of caucusing opinions" and "his practice of making up opinions in secret and delivering them as the orders of the Court": "an opinion huddled up in conclave, perhaps by a majority of one, delivered as if unanimous and with the silent acquiescence of lazy or timid associates, by a crafty Chief Judge, who sophisticates the

[1] See especially series of eighteen articles on the jurisdiction of the Supreme Court of the United States, written under the pseudonym of "Patrick Henry" in *Argus of Western America*, beginning May 12, 1824.

law to his mind, by the turn of his own reasoning." [1] No one had apparently claimed the abandonment by the Court of its former practice to be an evil, until the decision in *McCulloch* v. *Maryland;* but in that case, the fact that all the Judges, Federalist and Republican alike, had concurred in Marshall's broad doctrines without rendering separate opinions had caused surprise and dismay to the advocates of strict construction of the Constitution. Jefferson and Madison simultaneously resented this fact, and from that date pointed out in frequent letters that, as Jefferson said, this "cooking up of a decision and delivering it by one of their members as the opinion of the Court without the possibility of our knowing how many, who, or for what reasons each member concurred . . . completely defeats the possibility of impeachment by smothering evidence." Writing in 1823 to Judge William Johnson, who also favored *seriatim* opinions, Jefferson urged that each Judge should "prove by his reasoning that he has read the papers, that he has considered the case, that in the application of the law to it, he uses his own judgment independently and unbiased by party views and personal favor or disfavor. . . . The very idea of cooking up opinions in conclave, begets suspicions that something passes which fears the public ear, and this, spreading by degrees, must produce at some time abridgment of tenure, facility of removal, or some other modification which may promise a remedy. For, in truth, there is at this time more

[1] *Jefferson*, XII, letters to Thomas Ritchie, Dec. 25, 1820, to James Pleasant, Dec. 26, 1821, to William Johnson, Oct. 27, 1822, March 4, June 12, 1823. Jefferson's charge that Marshall originated the practice of having the opinions of the Court delivered by the Chief Justice was without foundation. The change in the practice of the Court had occurred before Marshall's accession to the Bench. See opinion of Chase, J., in *Bas* v. *Tingy*, 4 Dallas, 37, in which he said: "The Judges agreeing unanimously in this opinion, I presumed that the sense of the Court would have been delivered by the President, and therefore, I have not prepared a formal argument on the occasion."

hostility to the Federal Judiciary, than to any other organ of the government." [1] And to James Madison, who also agreed with him, Jefferson wrote urging him to bring his influence to bear on the Judges to secure a reversal of the present practice, saying: "I suppose your connection with Judge Todd, and your antient intimacy with Judge Duval might give you an opening to say something to them on the subject. If Johnson could be backed by them in the practice, the others would be obliged to follow suit, and this dangerous engine of consolidation would feel a proper restraint by their being compelled to explain publicly the grounds of their opinions." [2] When the Judges should at last be forced to announce their individual views, then it was Jefferson's plan that the Congress should formally denounce such judicial views as it disagreed with, and that if the Judges failed to adopt the conclusion reached by Congress, impeachment should follow. We are undone, he wrote to Nathaniel Macon, unless we "check these unconstitutional invasions of State-Rights by the Federal Judiciary. How? Not by impeachment in the first instance, but by a strong protestation of both houses of Congress that such and such doctrines, advanced by the Supreme Court are contrary to the Constitution, and if afterwards they relapse into the same heresies, impeach, and set the whole adrift." Such a remedy of course

[1] See letter of Johnson to Jefferson, Dec. 10, 1822, in which he very frankly expressed his views of his brethren; he said: "When I was on our State Bench, I was accustomed to delivering *seriatim* opinions in an Appellate Court, and was not a little surprised to find our Chief Justice in the Supreme Court delivering all the opinions. . . . But I remonstrated in vain; the answer was, he is willing to take the trouble, and it is a mark of respect to him. I soon, however, found out the real cause. Cushing was incompetent, Chase could not be got to think or write, Paterson was a slow man and willingly declined the trouble, and the other two Judges (Marshall and Bushrod Washington) you know are commonly estimated as one Judge."

[2] *Jefferson*, XII, letters to Madison, Jan. 6, June 13, 1823; *Madison*, IX, letters to S. Roane, Sept. 2, 1819, and to Jefferson, Jan. 15, 1823.

amounted to nothing more nor less than making Congress the final arbiter of the meaning of the Constitution. To the proposition to erect the Senate as the Supreme Appellate Court, however, Jefferson wrote that he doubted if such a plan "would be deemed an unexceptionable reliance." His own reliance as a last resort was in a Constitutional Amendment abolishing the present judicial tenure. "A better remedy, I think, and indeed the best I can devise," he wrote "would be to give future commissions to Judges for six years (the Senatorial term) with a reappointmentability by the President, with the approbation of both Houses."[1] The appointment of Judges for a term of years was also favored by *Niles Register*, which had a wide circulation and considerable influence and which said

[1] *Jefferson*, XII, letter to Nathaniel Macon, Aug. 19, 1821; see also letter to Lieut. Gov. Barry, July 2, 1822; letter to James Pleasant, Dec. 26, 1821.

An amusing comment on Jefferson's view is found in a letter of that staunch old Federalist statesman, Timothy Pickering of Massachusetts to James Hillhouse of Connecticut, Feb. 18, 1823: "He would have them hold their commissions only for four or six years — but renewable by the President and Senate. Thus rendering them temporizing, corrupt, and mischievous creatures and tools of the parties which may successively bear sway. How must the sage of Quincy . . . have bounced at the preposterous idea of his Monticello friend? After writing as many volumes on checks and balances, and the necessity of the independence of the several branches of the Government?" *Pickering Papers MSS*, 532. Martin Van Buren, writing in 1854 in his *Autobiography* in *Amer. Hist. Ass. Rep.* (1918), II, 183, 185, describes a visit to Jefferson in 1823, in which the latter "expressed the belief that the life tenure of their offices was calculated to turn the minds of the Judges", to the "subversion of the republican principles . . . and that the attention of our young men could not be more usefully employed than in considering the most effectual protection against the evils which threatened the country from that source. He spoke of the power of impeachment with great severity, not only as a mockery in itself, but as having exercised an influence in preventing a resort to a more thorough remedy, which he thought was only to be found in a change in the tenure of the judicial office. Annual appointments, as in the New England States, were, he thought, the best, but he would be content with four, or even six years, and trust to experience for future reductions. Fresh from the Bar, and to some extent, at least, under the influence of professional prejudices, I remember to have thought his views extremely radical, but I have lived to subscribe to their general correctness. . . . The only effectual and safe remedy will be to amend the Constitution so to make the office elective." *Ibid.*, 229: "The tide of public opinion on the subjects of the jurisdiction of the Federal Courts and the term for which their Judges should hold their offices has had floods, and it is my firm belief that the time is not far distant when these questions will be more seriously agitated."

editorially, in 1822: "There are two parties in the United States, most decidedly opposed to each other as to the rights, powers and province of the Judiciary, which many people believe are equally in the wrong. One party almost claims infallibility for the Judges, and would hedge them round about in such a manner that they cannot be reached by popular opinion at all, and hardly by any other means; the other would subject them to the vacillations of popular prejudice and seemingly to require it of them to define and administer the law, and interpret the Constitution according to the real or apparent expediency of things. It is essential that the Judges should not be subject to discharge, except on very strong grounds, yet it seems equally necessary that some plan should be adopted by which the cool and deliberate opinion of the people may be brought to act concerning them." [1]

The "disastrous" decisions of the Court in *Cohens* v. *Virginia* and *Green* v. *Biddle* in 1821 gave rise to the first concrete proposal made in Congress for the curbing of the power of the Court, when, on December 12, 1821, Senator Richard M. Johnson of Kentucky introduced in the Senate a resolution for an Amendment to the Constitution, providing that in cases where a State shall be a party, " and in all controversies in which a State may desire to become a party in consequence of having the Constitution or laws of such State questioned, the Senate of the United States shall have appellate jurisdiction." In his speech he stated that he introduced it because of the "serious consequences which had lately taken place between several of the States and the Judiciary of the United States." [2]

[1] *Niles Register*, XXII, June 22, 1822.

[2] *17th Cong., 1st Sess.*, Dec. 12, 1821, Jan. 14, 15, 1822. Spencer Roane wrote to Archibald Thweat, Dec. 24, 1821: "The subject of amending the Constitution in relation to decisions of the Federal Courts has been taken up in the Senate, as

In another long speech assailing the Federal Judiciary, he employed every argument which at the present day has been used in behalf of the doctrines of recall of Judges and of judicial decisions. "At this time," he said, "there is, unfortunately, a want of confidence in the Federal Judiciary, in cases that involve political power; and this distrust may be carried to other cases. . . . There is a manifest disposition on the part of the Federal Judiciary to enlarge, to the utmost stretch of constitutional construction, the powers of the General Government. . . . Judges, like other men, have their political views. . . . Why, then should they be considered any more infallible, or their decisions any less subject to investigation and reversion? . . . Every department which exercises political power should be responsible to the people. . . . The short though splendid history of this government furnishes nothing that can induce us to look with a very favorable eye to the Federal Judiciary as a safe depository of our liberties." He attacked the decisions in *McCulloch* v. *Maryland*, the *Dartmouth College Case*, *Sturges* v. *Crowninshield*, *New Jersey* v. *Wilson*, *United States* v. *Peters*, *Cohens* v. *Virginia* and *Green* v. *Biddle*, as "subject of much animadversion and dissatisfaction, . . . prostrating the States and in effect legislating for the people and regulating the interior policy of the States." "There must be a remedy," he said, "for this serious encroachment upon the first principles of self government of the States. . . . Some interposition is necessary. The preservation of harmony requires it. The security of our liberties demands it."

you will see, on the res. of Mr. Johnson of Kentucky, supported by Barbour. With a few to aid them, or rather to lead, on this important subject, I have prepared some Amendments to the Constitution to be adopted by our Assembly. They are very mild, but go the full length of the wishes of the Republicans on this subject. . . . Jefferson and Madison hang back too much."

Though Senator Johnson's extreme views were indorsed by a few other Senators, notably John Holmes of Maine, no action was taken by Congress upon the proposal. The movement, however, was regarded with great seriousness by friends of the Court. As has been seen, Marshall himself believed that the violent criticisms of the *Cohens Case* decision in Virginia were a part of a design to attack the Union; and this move in Congress was now generally regarded as a continuation of that attack. "I learn from Washington," wrote Jeremiah Mason to Judge Story, January 8, 1822, "that the expected attack on the Judiciary will be made, but, according to my informant, with little prospect of success at this time. The Kentucky proposal for amending the Constitution will end in smoke. The objections to that project are obvious and insuperable. Besides destroying one of the leading principles of our government, a separation of the departments, it would subject judicial decision to all the intrigue and management to which a Legislative body is always exposed. What chance for justice or consistency in a factious and somewhat popular body, feeling little responsibility, a vast majority of whom if left to the influence of correct motives would be wholly incompetent to the proposed task! If this experiment could be tried without disturbing the Constitution, I should not dislike to see the attempt. The Nation would soon become sick of it, and the failure would free the Supreme Court of much undeserved odium. I do not believe there is any immediate danger to the Judiciary by any acts of the Legislature. But what may be finally effected by perseverance and reiterated attempts, it is impossible to say. . . . The Supreme Court has no choice of courses to be pursued. The straightforward course is the only one

that can be followed. It may be with as much temperance as the Chief Justice pleases, and no man ever excelled him in the exercise of that virtue. But any vacillation or retracting, which might be set down to the score of the present noisy threats would be not only inconsistent with a due regard to personal character, but in their consequences destructive of the best interests of the Nation." [1] To this, Story answered with some despondency: "I am glad you write somewhat encouragingly respecting the Judiciary. My only hope is in the discordant views of the various interested factions and philosophists. Mr. Jefferson stands at the head of the enemies of the Judiciary, and, I doubt not, will leave behind him a numerous progeny bred in the same school. The truth is, and cannot be disguised, even from vulgar observation, that the Judiciary in our country is essentially feeble and must always be open to attack from all quarters. It will perpetually thwart the wishes and views of demagogues, and it can have no places to give and no patronage to draw around it close defenders. Its only support is the wise and the good and the elevated in society; and these, as we all know, must ever remain in a discouraging minority in all Governments. If, indeed, the Judiciary is to be destroyed, I should be glad to have the decisive blow now struck, while I am young and can return to the profession and earn an honest livelihood. If it comes in my old age, it may find me less able to bear the blow, though I hope not less firm to meet it. For the Judges of the Supreme Court there is but one course to pursue. That is, to do their duty firmly and honestly, according to their best judgments. . . . I believe the Court will be resolute, and will be

[1] *Mason*, Jan. 8, 1822; *Story*, I, 411, letter to Mason, Jan. 10, 1822.

driven from its course, only when driven from the seat of justice." [1]

To Rufus King, Mason wrote at this session: "From the excitement that prevailed in Virginia and several other States, a violent attack on the Supreme Court was expected in the course of the present session of Congress. I am glad to see that this . . . will probably end in smoke. I know it has often been said that lawyers are apt to attach too much importance to the Judiciary Department. I confess I have long been of opinion that the vigorous exercise of the Judiciary power, to the full extent now authorized by law, was absolutely necessary for the preservation of the Government. . . . Were it not for the extreme jealousy on the score of State-Rights felt in some sections of the Union, I should like to see provision made by law for the exercise of this power, to the utmost limits fixed by the Constitution. I cannot see how the other two departments of Government can be effective, where the Judiciary can do nothing. A restriction of the Judiciary powers necessarily involves a correspondent restriction of the other powers of government. It must be so, at least in all cases where the General Government comes in conflict with the State Government."

Although the move to constitute the Senate a supreme appellate judicial tribunal was not pressed in Congress, it continued to be advocated for several years in the press and by public men, especially in New York by Governor DeWitt Clinton and some of the Democratic papers.[2] *Niles Register*, in 1824,

[1] Story wrote to Mason, Feb. 21, 1822: "The propositions of Virginia, etc., and of Mr. Johnson of Kentucky, respecting the Judiciary are not likely to find much favor here in Congress." *Mason*, letter to Rufus King, April 12, 1822. Webster wrote to Story, Jan. 14, 1822, referring to Senator Johnson's speech which he said "has dealt, they say, pretty freely with the Supreme Court . . . so things go, but I see less reality in all this smoke than I thought I should before I came here."

[2] Richard Riker of New York wrote to Martin Van Buren, April 14, 1828, saying:

alarmed at the latest State opposition to the Court in the case of South Carolina, pointed out that "in the progress of time, the exposition of the Constitution may more depend on the opinions of the Supreme Court than on its own very carefully defined powers"; and it indorsed the plan of confiding a revisionary power in the Senate on all constitutional questions, as "essential to public harmony." On the other hand, the change was viewed with horror by the staunch Federalist papers, one of which termed it "one of the wildest and most hazardous of the innovations" which "would affect the Judiciary system and the Federal Constitution as deeply as any other change whatever"; and another said: "Whatever we do, for God's sake, let us abstain from that damnable political heresy of blending judicial with legislative powers. If we needed a warning voice on this subject, the decisions made in party times in the State of New York, as well as some other decisions connected with party, are amply sufficient to deter every considerate man from listening for a moment to a proposition so largely pregnant with momentous mischief." [1]

Reforms of the nature advocated by Jefferson required a Constitutional Amendment; but by those men who opposed the Court because of its alleged

"The encroachments made by latitudinary construction of the Federal Constitution have always been a source of alarm to me. This political heresy ought to be constantly watched. . . . I wish, myself, that all decisions by the Judiciary of the United States which involved either the rights of the States or the construction of the Federal Constitution were reviewable by the Senate. What would have been the consequences, if the Courts of the Union had decided, as was feared at the time, that the Embargo which was recommended by Mr. Jefferson and adopted by Congress was unconstitutional! . . . I would much rather trust the Senate with constitutional questions than the Judges. The sovereignty of the States, so vitally essential to the continuance of our great democratic Confederacy, would be always safe in the hands of the Senate of the Union. Not so with the Judges." *Van Buren Papers MSS.*

[1] *Niles Register*, XXVII, Dec. 18, 25, 1824, Jan. 8, 15, 1825; *National Gazette*, March 15, 1825; *New York Evening Post*, March 8, 1824.

trespasses on State-Rights, a more speedy and adequate remedy was proposed, when, in April, 1822, Andrew Stevenson of Virginia introduced in the House a resolution for the repeal of the Twenty-Fifth Section of the Judiciary Act. While he said that it was offered "in a spirit of peace and forbearance, and from a sense of duty to himself and his State", his direct purpose was to nullify the decision of the Court in *Cohens* v. *Virginia* and to abolish appellate jurisdiction over the State Courts.[1] In the next Congress, in 1824, Charles A. Wickliffe of Kentucky offered a similar resolution to inquire into the expediency of either repealing entirely the obnoxious Twenty-Fifth Section or modifying it so that the writ of error "shall be awarded to either party, without reference to the manner in which the question shall have been decided by the Supreme Court of the State."[2] In the Senate, also, Isham Talbot of Kentucky proposed to avoid the use of writs of error to State Courts, by allowing parties in all suits involving a Federal or constitutional question to remove the suit to the Federal Court before trial in the State Court. But while these direct attacks received practically no support, and while no action was taken by Congress on them, the Court was assailed from a new angle by Senator Johnson of Kentucky, who, aroused by the second decision in *Green* v. *Biddle* (which was alleged to have been made by a minority of the full Court), proposed a bill, December 10, 1823, requiring concurrence of seven Judges in any opinion

[1] *17th Cong., 1st Sess.*, April 26, 1822; *18th Cong., 1st Sess.*, Jan. 2, 30, 1824.

[2] This resolution was undoubtedly due to the courageous action of the Kentucky Court of Appeals in holding unconstitutional various Kentucky statutes on authority of decision of the United States Supreme Court. The suggestion is interesting as embodying at that early date the exact amendment which was made to the Judiciary Act in 1914, at the suggestion of the American Bar Association, viz.: that appeals to the Supreme Court should lie on State Court decisions adverse to the constitutionality of a State law as well as on decisions in favor.

involving the validity of State statutes or Acts of Congress. "Tremendous evils might result to the country from the powers imparted to its Judiciary, when a whole State might be convulsed to its very center by a judicial decision," said Johnson. "Some remedy must, ere long, be adopted to preserve the purity of our political institutions." Since many persons in the country believed that strong arguments could be made in behalf of such a measure, a bill was reported from the Committee on Judiciary by Senator Martin Van Buren of New York, on March 11, 1824, providing that no law of any of the States should be rendered invalid without the concurrence of five of the seven Judges. The bill, however, was laid upon the table.[1] In the House, similar measures were proposed by Robert P. Letcher and Thomas Metcalfe, both of Kentucky.[2] That this reform in the Judiciary system seemed, superficially, to have much to commend it is seen from the fact that Webster wrote to Judge Story, informing him that Judge Todd had told him it would give great satisfaction in the West, and asking him if he saw any evil in such a provision. Later, however, Webster decided to oppose the change, although he was willing to go so far as to offer a substitute to provide that, in cases involving the validity of a State statute or Constitution, "no judgment shall be pronounced or rendered until a majority of all the Justices of the said Court legally competent to sit in

[1] *18th Cong., 1st Sess.*, Dec. 10, 1823, March 11, 23, April 26, May 3, 4, 14, 17, 1824. The *New York Evening Post*, March 22, 1824, expressed the general sentiment of the Bar as to the proposition, when it said editorially: "If this . . . should prevail, will it not be an amendment in the very teeth of one of our republican maxims that a majority should govern? Turn it as you will, it comes at least to this — that the opinion of two Judges in the negative shall have more weight than five in the affirmative. It is, in fact, an impotent attempt to grasp what is not tangible."

[2] John Forsyth of Georgia, in the House offered as a substitute a proposal that a quorum of the Supreme Court should consist of such a number of Judges that a majority of the quorum should always be a majority of the whole Court.

the cause shall concur in the opinion, either in favor of or against the validity thereof, and until such concurrence such suit shall be continued." [1] There were two very vital objections to this requirement of a concurrence of five of the seven Judges, which seem to have been entirely overlooked in the debate. In the first place, it would have worked with singular injustice upon litigants in the Federal Circuit Courts; for, while an appeal to the Supreme Court from a State Court decision was only possible in a case where the latter had held a State law constitutional, an appeal from a Circuit Court decision was possible, even if that Court held the State law invalid. An appellant in the Supreme Court in the latter case would find himself in this predicament: if five out of seven Judges concurred in finding the State law invalid, he would lose his appeal; and if only four concurred, the proposed statute would prohibit the Supreme Court from finding the law invalid; hence the decision of the Circuit Court as to invalidity would become final; so that the appellant would lose in either case, and the proposed statute would be of no avail to him. But the fundamental objection to the proposition was that it completely ignored the true function of a judicial tribunal, which was, to hold the scales of justice even and to decide impartially between the parties, the appellant and the appellee both meeting before it on even terms. The proposed statute entirely lost sight of the fact that suits in the Supreme Court

[1] *Webster*, XVII, letter of April 10, 1824; on May 4, 1824, Webster wrote: "We had the Supreme Court before us yesterday, rather unexpectedly, and a debate arose which lasted all day. *Cohens* v. *Virginia*, *Green* v. *Biddle*, etc., were all discussed. Most of the gentlemen were very temperate and guarded; there were, however, some exceptions, especially Mr. Randolph, whose remarks were not a little extraordinary. Mr. (P. P.) Barbour reargued *Cohens Case*. Mr. Letcher and Mr. Wickliffe did the same for *Green* v. *Biddle*. I said some few things *eo instanti*, which I thought the case called for. The proposition for the concurrence of five Judges will not prevail."

involving the validity of State statutes were litigation between individuals and presented questions of the property or personal rights of individuals, and that each litigant was entitled to equal protection. These suits were not impersonal attempts to adjudicate between the Constitution, or the Federal Government, and the State; they were simply adjustment of the respective rights of two persons, one claiming a right under the Constitution, the other under the State law. A Federal statute, therefore, which required an appellant to persuade five out of seven Judges, in order to win, while the appellee in order to prevail had to persuade but three Judges, gave to the appellee in a law suit very heavy odds. The parties no longer came into the Court on an equal basis, but with the chances heavily weighted against an appellant — and this was not in consonance with any Anglo-Saxon system of justice. The debate over the proposed statute, however, was based little on general grounds of justice, but largely on the local political grievances which a few of the States felt might be cured by such legislation, and on the subjects of political controversy which might possibly be thus removed from the cognizance of the Court. In this connection, it is to be noted that the contingency of a decision on one dangerous political topic — Congressional power over slavery — was referred to during the debate on the Metcalfe resolution in a remarkably prophetic manner, by Daniel P. Cook, a Congressman from Illinois. In supporting the resolution, on the ground that the validity of the compact against introduction of slavery under which Illinois was admitted into the Union, would undoubtedly, at some time, be before the Supreme Court for decision, he said: "Should it happen, it will be a fearful question. It will involve nothing

less, sir, than the balance of power between the slave and non-slaveholding States. Those who witnessed, as well as those who know of, the convulsive discussion in this House on the Missouri question cannot fail to appreciate the magnitude of this subject. In deciding that question, should it ever arise, if a majority of that Court shall be found to decide against the validity of the act of the State, but not a sufficient majority under the provision now under consideration, it could not fail to shake the Nation to its center. While this tribunal may be called on to decide questions of such momentous magnitude, it behooves the House to examine well the effects of the principle now proposed." [1]

None of these projected changes in the Judiciary system received any considerable support. Before Congress met in 1825, however, the decision by the Court of two more great cases holding State laws of New York, Ohio and Georgia unconstitutional — *Gibbons* v. *Ogden* on March 2, 1824, and *Osborn* v. *Bank of the United States* and *Planters Bank of Georgia* v. *Bank of the United States* on March 19, 1824, and the pendency of the noted case of *Ogden* v. *Saunders* which involved the constitutionality of many State bankruptcy laws and which had been argued for the first time, March 3–5, 1824, reinforced the determination of the advocates of State-Rights in Congress to curb the Court's power.[2] In the Senate, in the debate over the bill providing three new Circuits and three new Supreme Court Judges, February 10–16, 1825, Senator Talbot of Kentucky, while stating that he cast no "imputation on the purity of intention or the correctness of judgment" of the Judges, and while

[1] *18th Cong., 1st Sess.*, 2647.
[2] *18th Cong., 2d Sess.*, Feb. 10, 16, 17, 18, 21, 1825.

admitting that they possessed individually the power to declare null and void the laws of every State, called attention to the decisions of *Fairfax* v. *Hunter* and *Cohens* v. *Virginia*, as "occurrences strongly calculated to arouse the feelings and excite the apprehensions of the patriotic statesmen anxious for the perpetuation of our happy Union." He criticized also the decisions of the Court upholding the Bank of the United States, saying: "Maryland and Ohio in their turns have had to encounter the power and influence of that great engine of political power — the Bank; have been severely attacked, have been successively vanquished in the contest." His colleague, Senator Johnson, of Kentucky, also returned to the attack, and, while admitting the "moral worth, intellectual vigor, extensive acquirements and profound judicial experience" of the Court, he complained that "according to the views of the Judiciary, it is in the power of the tribunals of the country to arraign, prostrate and annul not only a single law . . . but laws sanctioned by experience, consecrated by all the departments of State legislation, and acquiesced in by all good citizens. . . ." On the other hand, Philip P. Barbour of Virginia, although formerly counsel for the State in *Cohens* v. *Virginia* and virulent in opposing the Court's exercise of jurisdiction in that case, made light of the charge that the Court, "in which was deposited the peace and tranquillity of the Union", was destroying the rights or prostrating the independence of the States, and said that, if after forty years it had been found that the power of the Court had not been abused, the people "might reasonably expect that it would not be, hereafter."

At the next session, 1825–1826, when the bill for three new Circuits was again under discussion in the

House, John Forsyth of Georgia presented an amendment that no final judgment should be pronounced affecting the rights, liberty or life of any citizen of the United States by less than a majority of the whole Court. Kentucky Congressmen supported a similar amendment, confined to judgments pronouncing a State law unconstitutional; and they with others again launched attacks on this power of the Court to declare the invalidity of State laws.[1] Richard A. Buckner of Kentucky said that "its restrictive powers over the States have set with a strong and bold current like the Gulf Stream sweeping every obstacle before them in an undeviating course to the Federal ocean." George Kremer of Pennsylvania said that he entered his "solemn protest against the whole doctrine that the Supreme Court has power to pronounce acts of this House to be unconstitutional. In vain did our armies shed their blood in the field and our sages toil in the cabinet to secure our liberty, if it is to be subjected to the arbitrary decision of these Judges."

On the other side, Webster magnificently defended the Court under the Constitution and its necessary place in the scheme of the Federal Government. Charles F. Mercer of Virginia also defended the Court, and contended that the dissatisfaction with it was greatly exaggerated: "This Court has encountered much discontent, but in patient fortitude; not by its numbers, nor by bending to circumstances, it has ultimately prevailed over prejudice and passion, as it will yet continue to do, if left to the impulse which has hitherto guided its judgment, — the principles of eternal truth. Sir, it is a gratifying source of reflection, and manifests

[1] *19th Cong., 1st Sess.*, Dec. 13, 14, 15, 22, 1825, Jan. 4–25, May 3, 4, 8, 12, 1826, especially Webster's speech, Jan. 25. Charles A. Wickliffe, Dec. 12, 1825, again offered a resolution for a bill repealing the 25th Section, and providing for removal of cases containing a Federal question from the State to the Federal Courts.

the durability of our political fabric, that amidst all the shocks of this part of our Federal system, very few States have at any one time been united in its condemnation; and their successive efforts to shake the public confidence in its decisions have found those who were, at one time, its enemies, at another, its steadfast friends."

In the Senate, Van Buren of New York delivered a speech severely criticizing the powers of the Court, and attacking especially its broad construction of the phrase "impairment of obligations of contract", — "a brief provision which," he said, "had given to the jurisdiction of the Court a tremendous sweep. . . . There are few States in the Union upon whose acts the seal of condemnation has not from time to time been placed by the Supreme Court. The sovereign authorities of Vermont, New Hampshire, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, Missouri, Kentucky, and Ohio, have in turn been rebuked and silenced by the overruling authority of the Court." He admitted, however, that under the Constitution, its jurisdiction was justified; but if the question of conferring this jurisdiction should now arise for the first time, he would say that "the people of the States might with safety be left to their own Legislatures and the protection of their own Courts." Of the Judges themselves, however, Van Buren said that they possessed "talents of the highest order and spotless integrity", and that the Chief Justice "is in all human probability, the ablest Judge now sitting upon any Judicial Bench in the world." [1] To this attack upon the Court's jurisdiction by a Senator of New York, it was singular that the finest defense of the Court should be made by a Senator of South

[1] *19th Cong., 1st Sess.*, debate in the Senate, April 7, 10, 11, 12, 13, 14, 1826.

Carolina, William Harper, who said: "The independence of the Judiciary is at the very basis of our institutions. . . . It is in times of faction, when party spirit runs high, that dissatisfaction is most likely to be occasioned by the decisions of the Supreme Court. I do not believe that the Supreme Court, or the Constitution itself, will ever be able to stand against the decided current of public opinion. It is a very different thing from the temporary opinion of a majority; for a majority acting unjustly and unconstitutionally, under the influence of excitement, a majority though it be, is nothing more than a faction, and it was the object of our Constitution to control it. The Constitution has laid down the fundamental and immutable laws of justice for our Government; and the majority that constitutes the Government should not violate these. The Constitution is made to control the Government; it has no other object; and though the Supreme Court cannot resist public opinion, it may resist a temporary majority and may change that majority. However high the tempest may blow, individuals may hear the calm and steady voice of the Judiciary warning them of their danger. They will shrink away; they will leave that majority a minority, and that is the security the Constitution intended by the Judiciary."

That none of all these various attempts to restrict the powers of the Court succeeded was an amazing tribute to the popular confidence in that tribunal; and that Jefferson and his followers in Virginia, Kentucky and Georgia failed so completely to convince the American people of the need of reform in the Judiciary system can only be explained by the assumption that the country at large was convinced of the Court's integrity, of its freedom from partisan bias, and of its infinite value in the maintenance of the

American Union. It was not until five years later, during President Jackson's Administration in 1831, that it was confronted with a real crisis in its history.

But while these attacks from 1821 to 1826 upon the fundamental powers of the Court had been unsuccessful, attempts which had been coincidentally pressed in Congress for relief of the Court and reform of the Judiciary system had unfortunately proved equally without avail. Ever since the year 1816, there had been a series of efforts made for legislation to abolish the performance of Circuit Court duties by the Judges of the Supreme Court, and for the creation of an additional number of Circuits, in order to provide for the growing business in the West and Southwest. The demand for this reform had become more and more urgent as the number of States admitted to the Union increased; for since the Western States, with a population equal to that of the entire Union in 1789, had only one Judge of the Supreme Court assigned to them, such a judicial system was naturally a constant source of dissatisfaction.[1] Bills to accomplish reform in this respect had been recommended by Presidents Madison and Monroe, and had been introduced into Congress in 1816, 1817, 1818 and 1819, but had failed of passage.[2] As Jeremiah Mason wrote: "There is repeated a saying of A. Burr, 'that every Legislature, in their treatment of the Judiciary, is a d—d Jacobin Club.' There is certainly nothing in a good Judiciary likely to attract the favorable regards of a Legislature in turbulent party times. The dominant party in such times can expect no aid in furtherance of some of their meas-

[1] Kentucky was admitted in 1792, Tennessee in 1796, Ohio in 1802 and Louisiana in 1812; Indiana became a State in 1816, Mississippi in 1817, Illinois in 1818, Alabama in 1819, Maine in 1820, Missouri in 1821.

[2] *14th Cong., 3d Sess.*, Dec. 23, 1816; *Madison*, VIII, letter of Dec. 9, 1817; *15th Cong., 1st Sess.*, Jan. 27, 1818, in the Senate, Dec. 9, in the House. *15th Cong., 2d Sess.*, Nov. 30, Dec. 2, 1818, in the Senate, Jan. 4, 1819, in the House.

ures from the Judiciary. Indeed, both parties, having unreasonable expectations of aid from the Judiciary are usually disappointed and are apt to view it with jealousy." [1] But while the defeat of the bills carrying the much-needed relief to the Court had been partly due to this indifference on the part of Congress, it had also been caused by the fear of increasing Executive patronage and the unwillingness of the Anti-Administration forces to allow the new offices to be filled by the President. "They fear," wrote Judge Story, "there is danger . . . that the new Judges will be exclusively selected from the Republican Party. Both these motives will probably induce the great bulk of the Federalists to vote against it, and among the Republicans, it is well known there are many hostile in the highest degree to any scheme which changes or gives more effect to the jurisdiction of the Courts of the United States; so that the bill will, between these opposing parties, fall to the ground." [2]

So far as the bills were opposed on their merits, the arguments were chiefly based on the fear lest the Judges, on being relieved of Circuit duty, would become "completely cloistered within the City of Washington, and their decisions, instead of emanating from enlarged and liberalized minds, would assume a severe and local character", or lest the Judges might

[1] *Mason*, letter of Jan. 15, 1818.

[2] *Story*, I, 327, letter of Feb. 17, 1819; see also letter of Webster to Story, Dec. 9, 1816. Rufus King wrote to Christopher Gore of Massachusetts, Jan. 20, 1819: "Whether the bill will pass the House, I am unable to foretell, but if it should, I fear that Monroe would be afraid to appoint (Jeremiah) Mason, (David) Daggett, or other Federalists. John Holmes would be a more likely candidate than Mason for the Eastern Circuit," and Gore replied, Jan. 29, 1819: "If your Judiciary Bill shall pass the House and Monroe shall have the baseness to put Holmes on the Bench instead of Mason, he will act worse than I have predicted, though I have never believed he would or could do as well as from various motives we are disposed to presume in this part of the country." *King*, VI. The same fear of Executive patronage had been largely responsible for the failure of President Madison's recommendation in 1816–17, see *Papers of Thomas Ruffin* (1918), I, by T. J. de R. Hamilton, letter of W. N. Edwards to Ruffin, Dec. 9, 1816.

become "another appendage to the Executive authority", subject to the "dazzling splendors of the palace and the drawing room", and the "flattery and soothing attention of a designing Executive", as a Senator from Pennsylvania, Truman Lacock, said.[1] The same Senator uttered the following extraordinary forebodings as to the undue influence and control which Washington lawyers would acquire over the Court, if, by locating the Judges in Washington, they should be subjected to the "dangerous influences and strong temptations that might bias their minds and pollute the stream of National justice":

> You will have not only your Judges but your attorneys confined to the City of Washington. The Judges are to be old men when appointed, and the infirmities of old age will every day increase, and as the useful and vigorous faculties of their minds diminish, in the same proportion will their obstinacy and vanity increase. Old men are often impatient of contradiction, frequently vain and susceptible of flattery. These weaknesses incident to old age will be discovered and practised upon by the lawyer willing to make the most of his profession, and located in the same city, holding daily and familiar intercourse with the Judges. And thus, your Court may become subservient to the Washington Bar. The Judges, bowed down by the weight of years, will be willing to find a staff to lean upon; and the opinion of the Washington Bar is made the law of the land. A knot of attorneys at or near the seat of Government having gained the ear, and secured the confidence of the Court, will banish all competition from abroad. . . . With what painful reflections and awful forebodings would a Kentucky lawyer enter this Court? No man that had heard the cause argued at home — no man personally known to him, and on whom he can rely for official integrity, is seen on the Bench. Like a stranger in a strange land he feels his situation comfortless and gloomy. He takes his solitary seat at the Bar — he views the Court as belonging to the

[1] *15th Cong., 2d Sess.*, 131, Jan. 12, 1819.

same family, and almost identified with the great Crown lawyers that are to oppose him; and thus with fear and trembling, he approaches the cause of his client, doubting and half believing that the cause has already been prejudged by the Bench, or that the weight and influence of legal talents will stifle the calls of justice; and should an observation drop from the Bench during the discussion to confirm his doubts, he abandons, as desperately hopeless, the cause of his client, however just. This would be a deplorable state of things. But adopt this system (thus subject to abuse) and this state of things takes place sooner or later. The distributive justice of the Nation may be subjected to the control of a combination of Washington lawyers.

In 1823 and 1824, determined efforts were again made to effect the Judiciary reform, and President Monroe earnestly recommended it.[1] Judge Story wrote to Webster that while he was quite sure of the advantage to the Judges "in quickening their diligence and their learning, . . . it is scarcely possible that they can do the duties long, as business increases upon them." He favored a Supreme Court of nine members, so that the Judges might be numerous enough "to bring to the Court an extensive knowledge of local jurisprudence" in view of the "vast extent of our territory and the vast variety of local laws", and he felt that the West should have at least two out of the present seven Judges.[2] In

[1] Madison wrote to Jefferson, June 15, 1823, that it could not be denied that "there are advantages in uniting the local and general functions in the same persons, if permitted by the extent of the country, but if this were ever the case, our expanding settlements put an end to it. The organization of the Judiciary Department over the extent which a Federal system can reach involves peculiar difficulties. There is scarcely a limit to the distance which turnpikes and steamboats may, at the public expense, convey the members of the Government and distribute the laws. But the delay and expense of suits brought from the extremities of the Empire, must be a severe burden on individuals, and in proportion as this is diminished by giving to local tribunals a final jurisdiction, the evil is incurred of destroying the uniformity of the law." *Madison*, X; Eighth Annual Message of President Monroe to Congress, Dec. 7, 1824.

[2] *Story*, I, 435, letter of Jan. 4, 1824. Six days later, Story wrote that he did not wonder at the impatience of the West and he hoped for two additional Judges. "If we should be so fortunate as to have the gentlemen you name, in Judge W.

1824–1825, a bill was reported in the Senate from the Committee on the Judiciary by Martin Van Buren of New York, providing for ten Circuits, abolition of Circuit Court duty by the Supreme Court Judges, and two Terms of the Supreme Court. Over this bill and an amendment to provide for ten Supreme Court Judges to do Circuit Court duty, a hot debate arose — the merits of the question being complicated by many amendments seeking to curb the power of the Court to declare State Laws unconstitutional. But again Congress failed to act, fearing to trust the President with the new appointments. "I have as yet reported no bill on the Judiciary but incline to think we shall recommend a partial system of Circuit Judges," wrote Webster. "If we had more confidence as to the course the appointing power would take, we might act differently." [1] Finally, in 1826, the situation of the Court became such that some form of relief by legislation became imperative. The docket was heavily congested and the number of causes of high importance was constantly increasing. The Chief Justice was seventy-one years of age; Duval was seventy-four; Washington was sixty-four; Todd had been long ill, Thompson was new to the position; and the Court seemed unable to cope with the burden of its duties.[2] Accordingly a bill

and Judge B. I shall congratulate myself upon the favorable auspices under which we live." The identity of the men, thus suggested for the new positions, is not known.

[1] *18th Cong., 1st Sess.*, Dec. 10, 11, 1823, March 11, 23, April 26, 1824; *18th Cong., 2d Sess.*, Feb. 10, 16, 17, 18, 31, 1825; *Letters of Daniel Webster* (1902), ed. by C. H. Van Tyne, letter of Webster to Jeremiah Mason, Feb. 15, 1824.

[2] In 1825, the Court disposed of 38 out of 164 cases on the docket, hardly more than one a day. "This would seem," said *Niles Register*, XXVIII, March 26, 1825, "to be doing business fast enough, when we reflect on the importance of the decisions of the tribunal; but even now it has matters sufficient ahead to occupy all the spare time of the Judges for nearly five years to come." April 1, 1826, *Niles Register*, XXX, said: "After an incessant occupation of more than six weeks, out of 190 cases on the docket, the Court was able to dispose of only 49." A graphic complaint of the condition was made by Pearce of Rhode Island in the House of Representatives. *19th Cong., 1st Sess.*, Jan. 17, 1826.

was introduced in the Senate by Martin Van Buren, and in the House by Daniel Webster, providing for an increase in the number of Circuits to ten with three additional Supreme Court Judges and this measure actually passed the House.[1] One of the chief arguments in its favor had been the necessity for allaying the feeling of distrust of the Court which had been growing for many years in the West. "The most important consequence of this measure is its tendency to satisfy and conciliate the Western States. It will lessen, if not destroy, their antipathy to the Supreme Court," wrote Jeremiah Mason to Webster.[2] On the other hand, there was opposition even in the West itself. "The real truth is, the gentlemen in the Senate who are called the opposition do not wish the bill to pass," wrote Webster to Story. "Even those of them who are from the West have but a cool desire for it. I suppose the reason is, they do not wish to give so many important appointments to the President."

In the debate, the arguments in favor of and against the relief of the Judges from Circuit Court duty were again urged with considerable extravagance and often in picturesque language.[3] The necessity of having the

[1] Judge Story wrote March 15, 1826: "A bill has passed the House of Representatives to increase our number to ten, and it is very probable that it will receive the approbation of the Senate. It gave rise to one of the most vigorous and protracted debates which we have had this winter. Our friend, Webster, greatly distinguished himself on this occasion and in the estimation of all competent Judges, was *primus inter pares*." *Story*, I, 493.

[2] *Life of Daniel Webster* (1870), by George T. Curtis, II, letter of Feb. 4, 1826. It is a singular fact that considerable doubt was expressed in the Eastern States, as to the existence of Western lawyers qualified to fill the new positions. This view, however, was not held by Webster, who favored the appointment of two of the new Judges from the West, and who wrote to Judge Story, Jan. 29, 1826: "There will be no difficulty in finding perfectly safe men for the new appointments. The contests on those constitutional questions in the West have made men fit to be Judges." On Dec. 26, 1826, Webster wrote "that the West should have two Judges on the Supreme Bench." *Webster*, XVII.

[3] For these debates in the House, see: *19th Cong., 1st Sess.*, Dec. 22, 1825, Jan. 4, 5, 6, 9, 10, 11, 12, 18, 19, 21, 23, 24, 25, April 17, 24, 28, May 7, 12, 1826, in the Senate, *ibid.*, Dec. 14, 15, 1825, Jan. 9, April 7, 10, 11, 12, 13, 14, 15, May 3, 8, 1826.

Judges keep in touch with local conditions, and with the peculiar statutes of the various States, especially with the Western land laws, was vigorously urged, as well as the danger that, by absenting themselves from jury trial and the active life of different parts of the country, the Judges might become mere "cabinet lawyers", "book-men." "The Supreme Court is, itself, in some measure, insulated," argued Webster, "it has not frequent occasions of contact with the community. The Bar that attends it is neither numerous nor regular in its attendance. . . . If the Judges of the Supreme Court, therefore, are wholly withdrawn from the Circuits, it appears to me there is danger of leaving them without the means of useful intercourse with other judicial characters, with the profession of which they are members, and with the public. . . . I think it useful that Judges should see in practice the operation and effect of their own decisions. This will prevent theory from running too far, or refining too much." James Buchanan also feared any policy which should confine the Judges to sitting at Washington, and said: "Next to doing justice, it is important to satisfy the people that justice has been done. This confidence on their part in the Judiciary of their country produces that contentment and tranquillity which is the best security against sudden and dangerous political excitements." If the Judges should become an Appellate Court only, sitting in Washington, he asked: "What will be the consequence when this tribunal shall be brought into collision with State laws and excited State authorities? Is there not great danger that it will become odious? . . . Is this atmosphere so pure that there would be no danger from such a residence? A large portion of the people of this country hold a different opinion. They think this atmosphere is more tainted than that of any

other portion of the country. If the Supreme Court should ever become a political tribunal, it will not be until the Judges shall be settled in Washington, far removed from the People, and within the immediate influence of the power and patronage of the Executive." [1] Van Buren in the Senate held similar views, saying that he conscientiously believed "that to bring the Judges of the Supreme Court to the Seat of the General Government, and making them, as it were, a part of the Administration — for such, it is to be feared, would soon be its effect — would bode no good to the State Governments." Ralph J. Ingersoll of Connecticut, in the House, deplored a condition in which the Judges "should be always snuffing the atmosphere of Washington, and living, as it were, under the eaves of the Palace." John L. Kerr of Maryland, in the House, feared that if the Judges remained in Washington "where they would never be seen but by lawyers and idle spectators, they would in a few years become indolent, and lose their dignity and influence in the eyes of the nation. They will fall into a natural indulgence in the ordinary literary pursuits or other occupations . . . When the Judges shall have sunk in indolence, they will become objects of suspicion."

On the other side, Charles F. Mercer of Virginia in the House claimed that Circuit duty was "to send a Judge from this Court into a distant Circuit, popularity hunting. You send him to imbibe the taint of popular

[1] In 1830, in a debate on a similar bill for new Judges and Circuits, Buchanan arguing retention of Circuit duty stated that he feared the danger of bringing the Supreme Court Judges permanently to Washington "within the very vortex of Executive influence" and of converting them "into the minions of the Executive"; while he did not anticipate actual corruption "if you place them in a situation where they or their relatives would naturally become candidates for executive patronage, you place them in some degree under the control of Executive influence. . . . If they were to be confined in the exercise of their high and important duties "to the gloomy and vaulted apartment they now occupy, would they not be considered a distant and dangerous tribunal?" *21st Cong., 1st Sess.*, Jan. 14, 1830.

prejudice and then bring him back to innoculate the Court." [1] He treated with much sarcasm the charge as to the "infectious air of Washington."

Is it to escape, as gentlemen more than insinuate, the atmosphere of Washington — of the ten miles square? The Judges need not reside here. But is this atmosphere inconsistent with judicial purity? Is it really infected? . . . Its atmosphere! Do we not breathe it ourselves? and are we infected with the contagion? Our Chief Magistrate is compelled to inhale it, and with him, his Cabinet, the greater portion of every year; are we afraid to trust the Supreme Court within an influence which we ourselves encounter, it seems, without apprehension, for a longer period of every Congress, than the Judges themselves would be required to do? Is it of their encroachments upon our rights, that we are afraid? They sit at the other end of the Capitol, with open doors, guarded by a solitary officer; and we, the sentinels of the People, are here to watch them, with the power of impeaching and removing them from office. Do we apprehend that they will pronounce our acts unconstitutional? We have but to step a few hundred feet, to hear their reasons for so doing; to explore their motives if we please; and as *amici curiae*, to partake of the argument by which those acts are vindicated.

Do the Representatives of a particular State apprehend the subversion of their local laws, from misapprehension, or corruption, in the Supreme Court? Let them go forth to the Hall of Justice and enlighten, by their knowledge, the ignorance of the Bench; or detect, by their discernment, the evidences of its criminal intentions.

To the arguments that the Judges should "associate with the people" Tristram Burgess of Rhode Island, said in the House:

. . . They must, however, have the benefit of travel; and if so, in the common method, in coaches, wagons, solos, gigs, carryalls; in steam-boats, packet-boats, and

[1] *19th Cong., 1st Sess.*, speeches of Mercer and Burgess, Jan. 25, 1826.

ferry-boats; receiving the full benefit, in eating houses, taverns, boarding-houses and bar rooms, of the conversations of learned tapsters, stewards, and stage coach drivers. No man, I must own, who travels in the ordinary method — and Judges can hardly afford to travel in different style — will lose any portion of these several sorts of accommodation and instruction. Judges will, in serious truth it is said, by travel, mingle with the People, and often come in contact with them. Will they mingle with the poor, the ordinary? With mechanical men; with middling interest men; with the great community of toil, and sinew, and production? No, sir, they can do no such thing. Let them have the humility of Lazarus, and the versatile affability of Alcibiades, and they can do no such thing. There is to such men, as it was once said of a learned Judge — than whom no man ever bore his honors more meekly — there is, I say, to the feelings of such men, around a Judge, a kind of repulsive atmosphere. They stand aloof, and give him a large room. They bow not, indeed, with servility, but with profound respect; and they look towards him with a kind of hallowed reverence, as one set apart, and consecrated to the service, and surrounded by the ritual of justice. With all these men, the Judge can hold no tangible communion.

And he said that the "apprehended odiousness is but an apprehension. Such a Court cannot be suspected; it cannot be odious so long as it is filled with the Marshalls and the Storys of our country." Asher Robbins, Senator from Rhode Island, denied that a Court "stationed and stationary at the seat of Government" would become "dangerous to the Government, and the Government dangerous to the Court"; and John M. Berrien, Senator from Georgia, said that: "I have not myself been sensible of any peculiarly corrupting influence in the air of Washington. I do not believe that the integrity of a Judge would be sacrificed by a residence here, and it does not seem to me that the confidence which that department of the Government justly enjoys is to be ascribed to the semi-annual visits

of its members to the people of their respective Circuits. On the contrary, I believe it is derived from their personal integrity, from the intelligence and fidelity with which they have discharged their duties, and from the general correctness which has marked their decisions."

The necessity of abolishing Circuit duty for the relief of the Judges from the tremendous labors imposed upon them by the existing system was urged by many. Wickliffe of Kentucky said: "By refusing to reduce the labors of the Judge of the Seventh Circuit, by requiring him to travel 3360 miles per annum, you have prostrated his constitution, you have literally murdered him." Mercer pointed out that the Spring Circuits did not allow the Judges to remain in Washington later than March 20, giving them there only sixty-five working days. To the charge made in the House that this bill was an attempt by Kentucky, Ohio and other States to facilitate the packing of the Court, in order to reverse obnoxious decisions adverse to the constitutionality of laws of those States, and as an answer to the fears that the selection of Judges would be made from those States which were known heretofore to be hostile to the decisions of that Court, John C. Wright of Ohio said: "I have lived in the West many years, and am entirely ignorant of any feeling of this character there. How has it been manifested? Where is it? It is true, Ohio was dissatisfied with a decision of the Supreme Court, and she caused a case to be appealed from the Circuit to the Supreme Court, and presented certain points for decision requiring a reëxamination of the cause she was dissatisfied with, having perfect confidence in the Court. The examination was had and the decision quietly acquiesced in, though leaving unnoticed one of the principal points relied in. These

facts, instead of sustaining the gentleman's argument, prove the reverse of it true. I am also ignorant of any hostile feeling in the other Western States."

From a combination of many causes, the antagonism to President Adams, the jealousy of Virginia and the East against Kentucky and the West, the impossibility of arranging the States satisfactorily in the new Circuits, the opposition to the amendment requiring concurrence of seven Judges on any decision invalidating a State statute or Act of Congress, which had been adopted by the Senate — the bill was finally lost by a disagreement between the two branches of Congress. This unfortunate result seems to have been largely due to political maneuvering between Van Buren in the Senate and Webster in the House, the latter being desirous of having Ohio included in a separate Circuit from Kentucky, in order to facilitate the appointment as Judge of John McLean of Ohio, then Postmaster-General.[1]

[1] Webster wrote to Mason, May 2, 1826: "The Judiciary Bill is yet between the two Houses. It may possibly be lost but I think it will not be. If the Senate do not yield their amendment probably we shall agree to it. A pretty satisfactory arrangement will be made as to the Judge. The present Postmaster General (John McLean of Ohio) will be named in case Ohio be separated from Kentucky. Otherwise I conjecture the Judge in that quarter will be N. F. Pope, at present District Judge of Illinois." *Letters of Daniel Webster* (1902), ed. by C. H. Van Tyne.

Van Buren wrote to B. F. Butler, May 15, 1826 (*Van Buren Papers MSS*), that: "There has been a great deal of shuffling on the part of Webster & Co. to let the Bill die in conference. This plan we have defeated by a pretty strong course. With characteristic Yankee craft he has, though defeated in his main object, seized upon some clumsy expressions of Holmes (who reported the bill or rather amendment during my sickness) to hide the true ground of collision, the union of Kentucky and Ohio, by raising another question upon the form of the amendment. But the matter is perfectly understood here. Unless they can have a Judge in Kentucky (who is already appointed) and one in Ohio also, they wish to defeat the bill, in hopes of getting a better one next year. The great object is to get McLean out of the Post Office which can only be effected by his promotion, as they dare not displace him. It is also said that Ingham is to be P. M. G. and Webster, Speaker. There may be some mistake about this latter part although I am not certain that there is. The question will be taken in the House tomorrow and it is probable, though not absolutely certain, that the bill will fall. Webster has lost ground this winter and is not as happy as he expected to be."

Relief from the pressure of work on the Judges by abolition of Circuit duty being thus denied, it became necessary to apply some other remedy, and a bill was introduced and enacted, lengthening the term of session of the Court in Washington. Consequently, beginning in 1827 (12 Wheaton), the Court met on the second Monday of January in each year. President Adams had waited to ascertain whether the bill for additional Judges would pass during the 1826 Term, before filling the vacancy on the Bench caused by the death of Judge Todd; but on April 11, he finally decided to nominate Robert Trimble of Kentucky.[1] The new Judge was forty-nine years old, and had been for nine years United States District Judge. While holding that position, he had made himself obnoxious by reason of his insistence on the supremacy of Federal laws over State processes, in consequence of which his nomination was strongly opposed in the Senate by the Kentucky Senator, Rowan;[2] but after a motion of Senator Benton that it be referred to the Committee on the Judiciary "with instructions to report on the character of the rules adopted by said Trimble, while District Judge of Kentucky, relative to executions, and the authority,

[1] Henry Clay wrote to John J. Crittenden, March 10, 1826: "The President wishes not to appoint a Judge in place of our inestimable friend, poor Todd, until the Senate disposes of the bill to extend the Judiciary, though he may, by the delay to which that body seems now prone, be finally compelled to make the appointment without waiting for its passage or rejection. It is owing principally to Mr. Rowan that an amendment has been made in the Senate, throwing Kentucky and Ohio into the same Circuit, and his object was to prevent any Judge from being appointed in Kentucky. He told me that he wished the field of election enlarged for a Judge in our Circuit." *Life of John J. Crittenden* (1871), by Ann M. B. Coleman, I, 63, 65.

[2] Clay wrote to Crittenden, May 11: "Our Senator, Mr. R. made a violent opposition to Trimble's nomination and prevailed upon four other Senators to record their negatives with him. He is perfectly *impotent* in the Senate, and has fallen even below the standard of his talents, of which, I think, he has some for mischief, if *not* for good. The Judiciary bill will most probably be lost by the disagreement between the two Houses as to its arrangements. This day will decide."

under which the same were adopted", had been lost, the nomination was finally confirmed, May 9, 1826, by a vote of twenty-seven to five.[1]

In view of the proposal, made nearly one hundred years later, to require a concurrence of seven out of nine Judges in any decision holding an Act of Congress unconstitutional, it is interesting to note that only two of the similar proposals from 1823 to 1830, above noted, referred to Acts of Congress — those of Senator Johnson, Dec. 10, 1823, and of Senator Rowan, April 7, 1826; the others — those of Van Buren, March 11, 1824, Metcalfe, May 17, 18, 1824, Letcher, Jan. 26, 1825, Wickliffe, Jan. 22, 1827, and Barbour, Jan. 2, 1829 — related only to decisions holding State statutes invalid. It is singular, also, that no one pointed out, in debate, that to require five out of seven Judges to concur in holding an Act of Congress invalid, meant that a minority of the Court, *i.e.*, three out of seven Judges, would thus be enabled to hold such an Act valid. Had these State-Rights men realized that under their proposal a minority of the Court could have upheld the Sedition Law or the Bank of the United States charter, or other obnoxious centralizing and consolidating functions of the National Government, they would have been horrified. Moreover, minority decisions were the precise evil which Kentucky men, by other statutes, were trying to prevent. Another result of their proposal would also have been warmly resented by the States; for, under it, a minority of the Court would have been enabled to reverse a judgment of a State Supreme Court holding an Act of Congress invalid.[2]

[1] Marshall wrote to Story, May 26: "I am glad our brother Trimble has passed the Senate *maugre* Mr. Rowan. . . . I hope the seven Judges will convene at our next Term, and that the constitutional questions pending before us may be argued and decided." *Story Papers MSS.*

[2] See *Congress, the Constitution, and the Supreme Court* (1925) by Charles Warren.

CHAPTER EIGHTEEN

CONSTITUTIONAL LAW AND DANIEL WEBSTER

1827–1830

During the year 1827, the assaults upon the Court, which, for the past ten years, had been almost continuous both in Congress and in the press, temporarily ceased. Partisan controversy had become much less embittered. The financial conditions in the country were improving; the Bank of the United States was being less regarded as an engine of oppression to debtors and of prostration of State-Rights. The bitterest political opponents of the Court, Jefferson and Spencer Roane, were dead; and the dire predictions as to the effect of the Court's decisions on the scope of Federal power had thus far been unfulfilled. So that even *Niles Register*, which had long objected to the doctrines and jurisdiction of the Court, now confessed that "we have often thought that no person could behold this venerable body without profound respect for the virtue and talents concentrated on its bench, and with a degree of confidence that, as there must be some power in every government having final effect, it could hardly be vested anywhere more safely than in the Supreme Court, as at present filled." [1] As will be seen, however, this condition of affairs was but the calm before the storm which broke four years later. Meanwhile, the Court showed itself a potent factor in the development of the country, through its decisions in three great cases at the 1827 Term.

In the first of these, *Ogden* v. *Saunders*, 12 Wheat. 213, it settled the great question as to the respective

[1] *Niles Register*, XXXIII, Jan. 19, 1828.

powers of Congress and of the States over the subject of bankruptcy. Ever since the decision of the *Sturges Case* in 1819, the business community and the Bar had been left in doubt as to what the ultimate decision of the Court would be. The case had first come before it in 1824 and had presented questions not involved in the previous cases — a contract made in New York by a New York debtor with a citizen of another State, and made after the passage of the New York insolvent law.[1] "It will present a most interesting question for the decision of the Court," said a newspaper of that State, "and next to the Steamboat cause will be of more importance to the future welfare of the State than any other which will be agitated during the present Term. It is probable that Congress will soon pass a general bankrupt law — yet, if Congress declines passing any bankrupt law and the States are prohibited from adopting laws for themselves, the commercial state of the country will present a spectacle not found in history. The debtor, the merchant whose fortune has been swept away by events beyond his control, will be pursued by unrelenting creditors without cessation. New York has deep interest in the decision." Argument was begun on March 3, 1824, the day after the decision in *Gibbons* v. *Ogden*, and was continued for two days by Charles G. Haines, David B. Ogden and Henry Clay against Daniel Webster and Henry Wheaton. The Court, however, being greatly divided in opinion, adjourned without rendering a decision.[2] In 1825,

[1] See *New York Statesman*, Feb. 24, March 6, 9, 1824. Argument had been delayed in this case "until the state of the Chief Justice's health enabled him to be in Court." *Washington Gazette*, Feb. 23, 1824.

[2] "On many accounts," said the *New York Evening Post*, March 27, 1824, "we feel happy at the postponement — first, it shows that the Court has great doubt and difficulties and that the question is to be weighed and discussed with great caution and candor. Twelve months may produce able and luminous discussion on the subject."

owing to the absence of Judge Todd from illness, the Court was evenly divided. The same condition prevailed in 1826, as Judge Todd had died and his successor, Judge Trimble, was not appointed until after the end of the Term. It was finally argued (with several other cases presenting similar points) before a full Court on January 18–20, 1827, Webster and Wheaton appearing in opposition to the validity of the laws, and William Wirt, Edward Livingston, David B. Odgen, Walter Jones and William Sampson in their support. While the case was still under consideration by the Court, a vigorous debate took place in the Senate over the passage of a Bankruptcy bill then pending before it; and in a lengthy discussion of the constitutional powers of the Federal Government relative to such laws, the trend of the decisions was again the subject of much criticism. Van Buren of New York spoke of the "injurious extension of the patronage of the Federal Government and an insupportable enlargement of the range of judicial power," contemplated by the bill, and said that he "was aware of what, at the moment he was speaking, was going on below; but he would not for an instant anticipate further limitations upon the rights of the States upon this subject. As yet, they had not been restricted by the Supreme Court from passing prospective insolvent laws." Tazewell of Virginia denied the right of Congress to pass an insolvent law authorizing voluntary petitions for discharge from debt, saying that to permit such laws would be to prostrate the sovereignty of the States. Woodbury of Maine held a similar view, stating that such power in the Congress would bring "a vortex of disaster and difficulty to State-Rights and State independence." On the other hand, Hayne of South Carolina believed that the Court was about to hold that the States had no power to pass any insolvent law, whether before

or after the making of the contract; and he, therefore, advocated a National law. Berrien of Georgia agreed with Hayne. Reed of Mississippi opposed the bill, saying: "Let us vindicate the rights of the States in this respect, until that Department, intended to be coördinate, but, I fear, in practice supreme, shall have decided otherwise. Fortunately for the States, their power to pass prospective bankruptcy laws has not yet been paralyzed by the talisman of judicial authority. That right still remains unimpaired and, I have the fullest confidence, will escape unhurt through the ordeal of the Judiciary tribunals of the country." [1] Senator Reed's confidence thus expressed was justified when the Court, on February 18, 1827, four weeks after the argument of *Ogden* v. *Saunders*, rendered its decision, in which four Judges (three dissenting) concurred in upholding the validity of State insolvent laws enacted after the date of the contracts.[2] Judge Washington, though retaining his previous belief that the power of Congress over bankruptcy was exclusive, consented to uphold the New York statute, on the narrow ground that it formed a part of the contract when made and therefore did not impair its obligation; and he said, if he had any doubt, "a decent respect due to the wisdom, the integrity and the patriotism" of the Legislature made a presumption in favor of validity. "This has

[1] *19th Cong., 2d Sess.*, Jan. 18, 23, 24, 25, 26, 27, 1827. The bill was rejected Feb. 6, 1827.

[2] The close decision of the Court upon this important constitutional question was seized on by those Senators and Congressmen who, in this year and for several years past, had been pressing for the passage of a bill requiring the concurrence of all the Judges, or of five or seven, in any opinion rendered on such questions; and Wickliffe of Kentucky, on Jan. 22, 1827, had said in a vigorous speech urging a bill of such a nature: "What is at this very moment transpiring in another part of this Capitol? The validity of the New York insolvent laws, which have been enacted for thirty years in that State, which laws have received the highest judicial sanction in the Courts of that State, depends upon the opinion of a single Judge of the Supreme Court . . . the Court heretofore being equally divided upon the question."

always been the language of this Court . . . and I know that it expresses the honest sentiments of each and every member of this Bench." Judge Johnson, holding the view that the power of Congress was not exclusive, said that most of the dangers feared in leaving this power with the States are imaginary, "for the interests of each community, its respect for the opinion of mankind, and a remnant of moral feeling, which will not cease to operate in the worst of times, will always present important barriers against the gross violation of principle"; and he upheld the right of New York to enact insolvent laws applicable not only to contracts made after but before its passage. Judge Thompson, after stating that questions of the validity of State laws were "always questions of great delicacy" and that he was impressed "with the sentiment that this is the point upon which the harmony of our system is most exposed to interruption", upheld the law as applied to subsequent contracts. Judge Trimble held broadly that the law did not impair the obligation of contract. Chief Justice Marshall and Judges Story and Duval dissented, denying especially that an insolvent law enacted prior to a contract entered into the contract as a part of it, and stating that such a doctrine would cause this important clause of the Constitution to "lie prostrate and be construed into an inanimate, inoperative and an unmeaning clause." It is to be noted that though the question of bankruptcy legislation had become a heated political issue at this time, the Court did not divide on partisan lines, two Judges with strongly Federal tendencies joining with two strongly State-Rights Republicans to compose the majority.

This decision disposed of several of the cases before the Court, but not the case of *Ogden* v. *Saunders*, which presented the further question whether a State insolvent law

could discharge a contract of a citizen of another State. This point was argued on March 6, and one week later, the Court, in an opinion rendered by Judge Johnson and concurred in by the three Judges who had dissented upon the other point (Marshall, Duval and Story), decided that such a contract could not be discharged and that: "When the States pass beyond their own limits and the rights of their own citizens and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States which render the exercise of such a power incompatible with the rights of other States and with the Constitution of the United States." To this decision, there was a dissent on the part of the three Judges (Washington, Thompson and Trimble) who had united with Johnson in the previous cases in upholding the statute. This close division of opinion among the Judges, and the limitation of the legal operation of a State bankruptcy law to citizens of the State, gave great dissatisfaction to the country at large; and a prominent Western lawyer, in a thoughtful review of the decision, expressed the general opinion that: "The decision partakes more of legislation than adjudication. . . . The Judges have run into some very mischievous errors. One is the deep admixture of political expediency which is infused into and pervades many of their decisions, especially in expounding the Constitution. . . . It is understood that three of the Judges — Marshall, Story and Duval, — considered them (the insolvent laws) wholly invalid, wherever they provided for discharging the contract. The subdivisions of opinion, by which they are made inoperative in some cases, and obligatory in others, existed among the other four Judges. Without admitting that the three Judges were right, it seems clear to me

that the others must be wrong. And I hazard the opinion that, half a century hence, the decision now made will not be regarded as law." [1] Even as late as 1844, the *Western Law Journal* stated that these bankruptcy decisions "were most unfortunate cases for the people of this country and have had a most disastrous effect on multitudes of unfortunate debtors and have very much embarrassed Congress and the whole country." [2] Students of economic history will be inclined to agree with the views thus contemporaneously expressed and to believe that it would probably have been better for the country, had the Chief Justice's opinion prevailed and had the exclusiveness of the power of Congress over the subject been upheld. Certainly, the financial troubles which arose, during the next ten years, out of the over-speculation in public lands, canals and railroads, and out of disastrous banking methods, could have been alleviated by the exercise of Congressional power in the passage of a National Bankruptcy Act, when they could not be adequately dealt with by the insolvent laws of the separate States. The hard-pressed condition of the debtors, however, was somewhat relieved by a decision of the Court, in the year 1827, immediately after the decision in *Ogden* v. *Saunders*. For in *Mason* v. *Haile*, 12 Wheat. 370, it held that a Rhode Island statute abolishing

[1] *Liberty Hall and Cincinnati Gazette*, March 27, 1827.

[2] *Western Law Journal* (1843–44), I: "If the States are to be reasoned out of their sovereignty in this manner, they will soon have a narrow field to operate in. The Supreme Court will weave a web about them that will as effectually restrain their action as a strait jacket." And again in 1849, the same *Journal* criticizing Judge Johnson's opinion in *Ogden* v. *Saunders* said: "This was the first time that such a distinction had been heard of. That a law should be constitutional as to one set of creditors and unconstitutional as to another set was a striking novelty, but when the distinction was still further refined by making its constitutionality depend on the place where the contract was made or the parties resided, it appeared to be not only novel, but in direct conflict with the Fourth Article of the Constitution which requires 'full faith and credit' to be given in each State to the public acts and judicial proceedings of every other State." See also *Ogden* v. *Saunders Reviewed*, by Conrad Reno, *Amer. Law Reg.* (1888), XXXVI.

imprisonment for debt and passed after the date of a contract did not constitute an impairment of the obligation of the contract, since, as it stated: "This is a measure which must be regulated by the views of policy and expediency entertained by the State Legislatures. Such laws act merely upon the remedy, and that in part only." This decision, it will be noted, was in accord with the liberal sentiment of the times; for as James Kent wrote in his *Commentaries*, this very year: "The power of the imprisonment for debt, in cases free from fraud, seems to be fast going into annihilation in this country, and is considered as repugnant to humanity, policy and justice." Kentucky, in 1821, had been the first State to abolish such imprisonment as one of her series of laws for relief of debtors who had been injured by the specie-payment policy of the Bank of the United States. New York was soon to follow in 1831, and by the year 1857, practically all the States had enacted this form of relief for debtors.[1]

Three weeks after the decision in *Ogden* v. *Saunders*, the Court rendered an opinion in the second of the great cases at this Term, *Brown* v. *Maryland*, 12 Wheat. 419. This case was thenceforth to be noted as affording the occasion not only for one of the great fundamental decisions of American constitutional law, but for the first argument on that subject by a future Chief Justice of the United States, Roger B. Taney.[2] As Robert

[1] On this subject, see *History of the American People*, by John B. McMaster, VI; *Kent's Commentaries* (5th ed. 184), II, 398 note; *Imprisonment for Debt* (1842), by Asa Kinne; *Personal Memoirs of J. T. Buckingham* (1837), I, 102; *Beers* v. *Haughton* (1835), 9 Pet. 329; *Vial* v. *Penniman* (1881), 103 U. S. 714; *Thirty Years' View* (1856), by Thomas H. Benton, 291.

[2] Taney's first appearance was in 1825 in *Manro* v. *Almeida*, 10 Wheat. 473. In 1826, in *Etting* v. *Bank of the United States*, 11 Wheat. 59, involving the defalcation of the cashier, McCulloch (the *McCulloch* of *McCulloch* v. *Maryland*), Taney and Webster appeared against Wirt and Emmet; and Marshall in his opinion spoke of the "great efforts which have been bestowed upon the case", and the "elaborate arguments which have been made at the Bar." The Court being divided in its opinion, Taney and Webster lost their case. Story wrote of this

G. Harper had died in 1825, William Wirt alone remained to contest with Taney the leadership of the eminently talented Maryland Bar, and of these two competitors, who met in the argument of this great case, a contemporary gave the following vivid picture: "Between Mr. Taney and Mr. Wirt there was the greatest possible difference, in manner and appearance. Portly and erect, with what must have been a handsome figure before the assumed Aldermanic proportions, Mr. Wirt, when he arose to address a jury, impressed them with the idea of perfect health, whose only drawback was suggested by the pallor of his skin. His opening sentences were always accompanied by a pleasant smile, and it was apparent that he desired to establish in the beginning personal relations with those to whom he was speaking. His voice I have already described (the sweetness of his voice was only equalled by the charm of his smile). When Mr. Taney rose to speak you saw a tall, square-shouldered man, flat-breasted, in a degree to be remarked upon, with a stoop that made his shoulders even more prominent, a face without one good feature, a mouth unusually large, in which were discolored and irregular teeth, the gums of which were visible when he smiled, dressed always in black, his clothes sitting ill upon him, his hands spare with projecting veins, in a word, a gaunt, ungainly man. His voice, too, was hollow, as the voice of one who was con-

case (I, 492): "The Court has been engaged in its hard, dry duties with uninterrupted diligence. Hitherto, we have had but little of that refreshing eloquence which make the labors of the law light; but a case is just rising which bids fair to engage us all in the best manner. Webster, Wirt, Taney (a man of fine talents, whom you have probably not heard of) and Emmett are the combatants, and a bevy of ladies are the promised and brilliant distributors of the prize." Another case argued by Taney at the 1826 Term, in company with Wirt against Webster, "with great ability and care" and involving "a great variety of feudal and constitutional learning which the Court did not think it necessary to examine" was *Cassell* v. *Carroll*, 11 Wheat. 134. John Quincy Adams wrote of "Taney of whose talents, I had heard high encomium." *J. Q. Adams*, VI, Feb. 7, 1825.

sumptive. And yet, when he began to speak, you never thought of his personal appearance, so clear, so simple, so admirably arranged were his low-voiced words. He used no gestures. He used even emphasis but sparely. There was an air of so much sincerity in all he said, that it was next to impossible to believe he could be wrong. Not a redundant syllable, not a phrase repeated, and, to repeat, so exquisitely simple. . . . In connection with Mr. Taney's style of address, a story current at the Bar was, that Mr. Pinkney (Wirt?) had said when speaking of it, 'I can answer his argument, I am not afraid of his logic, but that infernal apostolic manner of his, there is no replying to.'" [1]

The arguments of *Brown* v. *Maryland* took place on February 28 and March 1, 1827, and the Court rendered a decision only eleven days later. It firmly declined to sustain Taney's contention and held that the Maryland statute involved, which imposed a license tax of fifty dollars on all importers and vendors of foreign commodities, was invalid as an interference with the Federal right to regulate foreign commerce and as a violation of the prohibition of import duties by a State. [2] "It may be doubted," said Marshall, "whether any of the evils proceeding from the feebleness of the Federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore,

[1] *Life and Times of John H. B. Latrobe* (1917), 202–203, by John E. Semmes.

[2] Taney, C. J., said as to this case in *Almy* v. *California* (1861), 24 How. 169: "It will be seen by the report of the case that it was elaborately argued on both sides, and the opinion of the Court delivered by Chief Justice Marshall, shows that it was carefully and fully considered by the Court." As this case first announced the "original package" doctrine, and first introduced the phrase "police power", see interesting historical discussion in *The Federal Power Over Carriers and Corporations* (1907), by E. Parmalee Prentice.

For early definitions of police power, see Taney, C. J., in *Pierce* v. *New Hampshire* (1846), 5 How. 583.

matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States. To construe the power so as to impair its efficacy would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." "This cause has excited much interest," said a Baltimore paper. "The impolicy of such a law, in its effects upon the commercial interests of Baltimore, was so obvious as to induce a strenuous opposition to its passage on the part of the merchants of that city. That opposition, however, was fruitless. Doubts were also entertained of its constitutionality, and it was at length determined to have that question finally settled. The result is that the law has been solemnly pronounced, by the highest judicial tribunal of our country, unconstitutional and void." [1] And *Niles Register*, in its editorial comment, described the law as "one of that class which is perpetually planning to tax Baltimore City for the benefit of the State of Maryland, and nearly the whole of the imposition would have been levied upon it. It is well known that we are not exceedingly anxious for the introduction and sale of foreign merchandise; but to have admitted the constitutionality of this law would have been to commit the regulation of commerce to the individual States, though expressly given to the United States." [2]

The third important case of the 1827 Term, *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, involved a vital question of corporation law — whether

[1] See *Baltimore Gazette*, quoted in *Niles Register*, XXXII, March 17, 1827.

[2] It may be noted that the State of New York had imposed a tax on all foreign goods sold in New York at auction. This statute, making the other States buying their foreign goods "tributary" to New York, was undoubtedly invalid under the decision in *Brown* v. *Maryland*. See *Baltimore Patriot*, April 3, 1827.

approval of acts of its agents by a corporation may be shown by presumptive testimony or only by written record and vote. Though Marshall had held on Circuit that such record and vote were necessary, an affirmance of this view by the Court would have retarded the commercial development of this country immeasurably, for it is to be noted that it was just at this time that American business corporations were beginning to "increase in a rapid manner and to a most astonishing extent" (as Kent then wrote).[1] Prior to 1827, owing to the tendency of State legislation to increase the personal responsibility of shareholders, business corporations had played a comparatively small part in commercial life; and practically the only corporations appearing as litigants in the Court, prior to 1830, were the banks and the insurance companies.[2] In this *Dandridge Case*, Webster and Wirt argued for the Bank of the United States against L. W. Tazewell.[3]

[1] See letter of Marshall to Story, July 2, 1823, describing his ruling and saying: "The case . . . goes to the Supreme Court and will probably be reversed. I suppose so, because I conjecture that the practice of banks has not conformed to my construction of the law. The Judge, however, who draws the opinion must have more ingenuity than I have if he draws a good one. . . . I shall bow with respect to the judgment of reversal, but till it is given, I shall retain the opinion I have expressed." *Mass. Hist. Soc. Proc., 2d Series*, XIV; *Kent*, II, 271.

[2] The Bank of the United States was involved in forty-four cases between 1815 and 1830, and other banks in about sixty cases.

[3] *Webster*, XVI; see letter to Biddle at the previous Term, March 21, 1826; "Dandridge's case was not reached until almost the last day of the Court, and until the Court had intimated that they should not take up another long or important cause. It was ready for argument, and printed cases are prepared for the use of the Court. In this case, according to your request, I engaged Mr. Wirt on the part of the Bank, as I have already advised you. I wish it to be understood in regard to this cause, that I consider myself as only filling Mr. Sergeant's place temporarily. If he should be here at the next Term, he will conduct the case, with Mr. Wirt."

An interesting illustration of the degree to which practice in the Supreme Court absorbed the time of eminent members of Congress the correspondent of the *Boston Courier*, March 3, 1827, wrote: "Mr. Webster, since I have been here, has been occupied almost every day in the Supreme Court. He is engaged in nearly all the important causes on the opposite side to Mr. Wirt. Mr. Wirt is a very able and powerful speaker. Mr. Webster is, therefore, now very little in the House, and had not made any speech there of much importance since my arrival." See also an interesting account of Webster in *Boston Courier*, March 5, 1830.

To the Bank's President, Nicholas Biddle, Webster wrote, February 24, of his confidence in winning the case:

When Mr. Sergeant went away and I was left in charge of the concerns of the Bank here, he told me that the Bank had at that time *not lost any cause in the Supreme Court.* If he should return at the next Term, I shall have the happiness, I trust, to tell him that it has lost none since. Dandridge's cause is not yet decided, but I have confidence the judgment below will be reversed, so that that will form no exception to our good fortune. I shall forward a little statement of my fees and Mr. Wirt's receipt tomorrow. In Dandridge's case, I shall take the liberty of charging somewhat *liberally.* I never gave more attention, either to the preparation or the discussion of a cause; and I am vain enough to think that my labours were not without some influence on the result.

And on February 20, after the argument, he had written:[1]

As to Dandridge, we hear nothing from the Court yet. The Ch. Jus. I fear will *die hard.* Yet I hope that, as to this question, he is *moribundus.* In everything else, I cheerfully give him the Spanish Benediction "may he live a thousand years." I feel a good deal of concern about this; first, because of the amount in this case; second, because of its bearing on other important questions, now pending or arising, as I have understood; and last, because I have some little spice of professional feeling in the case, having spoken somewhat more freely than usually befits the mouth of an humble attorney at law, like myself, of the "manifest errors" in the opinion of the Great Chief. I suppose we shall have a decision in a few days. You see what a fire the Judges have made on the question of State Bankrupt laws. No two of those who are *for* the validity of such laws agree in their reasons. Those who are *against* their validity, concur entirely. Is there not an old saying — if there be not, let it go for a new one — that truth is one, but error various?

[1] Webster wrote again on Feb. 25: "In my letter I have spoken of success in Dandridge's case only on the ground of general confidence, arising from the consciousness of a good case, etc., — but you may take it for granted that my expectation will not be disappointed."

The opinion of the Court, delivered by Judge Story on February 28, upheld Webster's cause and overruled the Chief Justice, the latter dissenting but also admitting that the Court's decision might be "perhaps to the advancement of public convenience." [1]

While a few lawyers feared lest the decision might increase the power of corporations and might "enable a vast engine of factitious wealth to crush communities", the principle laid down by the Court was welcomed by the business world.[2]

The Court, "after an arduous and important session" of ten weeks, adjourned on March 16, 1827, having decided and dismissed seventy-seven causes "some of them of deep and delicate interest and of high consequence", and leaving on the docket for the next Term one hundred and nine causes. "The industry and vigor of the Judges is worthy of all commendation and fit to be examples even to younger men," said the newspapers of the day. "Abstaining altogether from, or partaking very sparingly in, the hospitality and society of the city, they have given their days to the hearing, and their early mornings and evenings to the consideration, of the many important and interesting causes which have come before them from the different parts of the Union." [3]

With the year 1828, there came a great change in the character of the cases before the Court. Piracy,

[1] Of his victory, Webster wrote to Mason, April 10, 1827: "We got on with the Virginia cause famously. You will see, when you see the report, that our friend Judge Story laid out his whole strength and made a great opinion. The Attorney-General argued the cause with me. It was not one of his happiest efforts. By the aid of your brief, I got on tolerably well, and took the credit, modestly, of having made a good argument; at any rate, I got a good fee; and although I shall not send you your just part of it, I yet enclose a draft for the least sum which I can persuade myself you deserve to receive."

[2] See argument of Charles J. Ingersoll in *Bank of Augusta* v. *Earle*, 13 Pet. 576, in 1838.

[3] *Niles Register*, XXXIII, March 24, 1827; *Boston Courier*, March 22, 1827.

slave trade, prizes, war and violation of neutrality largely disappeared as subjects of litigation; and the growing commercial development of the country was signified by the decision, during the three years, 1828 to 1830, of nearly thirty cases involving banking questions and of numerous cases on notes, bills of exchange and insurance.[1] The chief case of historic importance at this 1828 Term was the noted *American Insurance Co.* v. *Canter*, 1 Pet. 511, involving the validity of the decrees of a Territorial Court of Florida, argued by David B. Ogden against Webster and Whipple. In this case, the Court affirmed the right of Congress to authorize such Courts, in the exercise of its power "to make all needful rules and regulations respecting the territory or other property belonging to the United States", and unhampered by the provisions of the Constitution respecting the tenure of office of the Federal Judiciary. The decision became the foundation of much of the discussion, thirty years later, in the debates on the power of Congress over slavery in the Territories.

Judge Trimble died in September, after but two years' service on the Court; and a bitter political contest ensued over the appointment of his successor. President Adams was defeated by Jackson at the Presidential election in that autumn, and the Democrats very naturally believed that the appointment of Trimble's successor should be left to the newly elected President. The position was offered, however, by Adams to Charles Hammond,[2] the most distinguished lawyer

[1] Writing to Jeremiah Mason, March 20, 1828, Webster said: "The Court has had an interesting session and decided many cases. The Judge of our Circuit (Story) has drawn up an uncommon number of opinions and I think some of them with uncommon ability." *Letters of Daniel Webster* (1902), ed. by C. H. Van Tyne. Judge Story wrote to Jeremiah Mason, Feb. 27, 1828: "We have done a good deal of business, and shall not probably leave sixty causes behind us. This is a great victory over the old docket, and encourages me to hope much for the future course of the Court." *Mason.*

[2] *History of Ohio* (1912), by Emilius O. Randall and Daniel J. Ryan, III, 331

in Ohio, and to Henry Clay, both of whom declined. Clay strongly urged upon Adams the appointment of the eminent lawyer and Whig statesman, ex-Senator John J. Crittenden of Kentucky, and Chief Justice Marshall was favorable to the latter, though stating to Clay that it would not be decorous for him to approach the President:[1]

I need not say how deeply I regret the loss of Judge Trimble. He was distinguished for sound sense, uprightness of intention and legal knowledge. His superior cannot be found. I wish we may find his equal. You are certainly correct in supposing that I feel a deep interest in the character of the person who may succeed him. His successor will, of course, be designated by Mr. Adams, because he will be required to perform the most important duties of his office, before a change of administration can take place. Mr. Crittenden is not personally known to me, but I am well acquainted with his general character. It stands very high. Were I myself to designate the successor of Mr. Trimble, I do not know the man I could prefer to him. Report, in which those in whom I confide concur, declares him to be sensible, honorable and a sound lawyer. I shall be happy to meet him at the Supreme Court as an associate. The objection I have to a direct communication of this opinion to the President arises from the delicacy of the case. I cannot venture, unasked, to recommend an Associate Justice to the President, especially a gentleman who is not personally known to me. It has the appearance of assuming more than I am willing to assume.

Many, including Crittenden himself, believed John Boyle, the distinguished Chief Justice of Kentucky, should be the nominee.[2] On December 17, 1828, Presi-

[1] *J. Q. Adams*, VIII, Dec. 2, 1828; *Works of Henry Clay* (1897), IV, letter of Marshall, Nov. 28, 1828.

[2] Crittenden wrote to Clay, Dec. 3, 1828: "As to the Federal Judgeship to which you say I have been recommended, I have only to remark that should it come to me, neither the giving or the receiving of it shall be soiled by any solicitation of mine on the subject. . . . Though I have never been guilty of the affectation of pretending that such an office would be unwelcome to me, I have certainly never asked anyone to recommend me. Indeed, I wrote to Judge Boyle that I would not

dent Adams sent Crittenden's name to the Senate. Within a few days, however, it became apparent that the Senate, which was Democratic in politics, did not propose to act on any nominations until after the inauguration of the new President. This policy aroused the bitterest feelings among the Whigs,[1] both because of the partisan nature of the action and because of the serious interference with the work of the Court, which was embarrassed by the vacancy and by the illness of the other Judges. "If there are no better reasons for neglecting to ratify or reject this

permit myself to be thrown into competition with him. He informed me that he would not accept the office, preferring the one he now holds." Later, he wrote to Clay, Dec. 27, 1828, when the question of his rejection by the Senate was pending: "I have felt great difficulty in acting on this subject. Though for many reasons, I would not solicit such an office, yet when the question may be whether my nomination shall be rejected by the Senate, I am warranted by a principle of self-defence in endeavoring to avert such a sentence. In this view of the subject, I have written letters to several of my old acquaintances in Congress, claiming the interposition of their liberality and justice in my behalf." *John J. Crittenden Papers MSS.*

[1] John Chambers, a Kentucky Congressman, wrote to Crittenden, Dec. 28, 1828: "What a set of corrupt scoundrels, and what an infernal precedent they are about to establish;" and again, Dec. 29: "But independent of their wish to reward their friends, there is, in the appointment to the Judiciary, a still more important ulterior object in view. Three of the present Judges of that Court are very old and becoming infirm. A party ascendancy in the Court is therefore hoped for and will be obtained if possible. . . . Whether the spirit of party is to triumph over the sense of constitutional obligation and imperious duty or not, will be tested by the disposition which may be made of your nomination. We still hope that there are a sufficient number of Jackson Senators to carry the nomination, who will rise above the disgraceful and degrading party feeling which would snatch from the present Executive the power of appointment." Charles A. Wickliffe of Kentucky wrote to Crittenden, Jan. 7, 1827, advising him to come to Washington and combat the "host in opposition to you." See also letter of Senator R. M. Johnson of Kentucky, Dec. 25, 1826. *John J. Crittenden Papers MSS.*

Timothy Pickering wrote to Marshall, Dec. 26, 1828: "When a vacancy occurs in the bench of the Supreme Court of the United States, I feel a deep solicitude that it may be filled, not merely with ability and learning, but with *Independence;* for without the latter, honesty in ordinary cases, involving no political consequences, is an essentially defective virtue. My solicitude for an able and independent Supreme Judiciary arises from my considering it as the guardian of public liberty, as holding the Moral Sceptre of the Union. In this regard, therefore I earnestly hope Mr. Adams may close his political course with an act distinguished for its high National importance, like that of his father's at the completion of *his* contracted cycle of four years. For himself it would be a redeeming act." *Pickering Papers MSS.*

nomination than party feelings or party politics," said a New York paper, "the majority of the Senate must be held responsible to the country for conduct which is unjustifiable in principle and most pernicious in practice. When the highest judicial tribunal in the Nation is made the tool of a party — when a Court, which has been established by the Constitution for the purpose of deciding questions of the highest importance, as it regards the welfare of the Union, the rights and independence of the several States, the interests of individuals and the character of the Nation, is selected for the express purpose of subserving the plans, and promoting the views of plotting, intriguing, selfish and ambitious politicians, the corner-stone of the government will be undermined, and the fabric left exposed to speedy destruction." To such attacks, a violent newspaper supporter of Jackson answered that the Whigs were equally playing politics, and that "it was nothing more or less than a movement of Mr. Clay to abuse the Senate for refusing to obey his dictation in placing one of his men on the Supreme Bench for life — a devoted partisan of Mr. Clay." [1] A few days later, it charged Clay with using the office to further his Presidential ambitions: [2] "If the proposition to reduce the number of Judges to six should prevail, it will follow, of course, that no nominations should be confirmed. If it does not succeed, the people have said that Messrs. Adams, Clay & Co., are not the persons to whom they would refer the important duty of nominating for office. . . . Mr. Clay, however, preferred to hold that office as a 'bait to catch gudgeons' . . . under the hope that each aspirant would be stimulated to redoubled exertions in his behalf during the late canvass." On January 27,

[1] *New York Daily Advertiser*, Jan. 24, 1829; *United States Telegraph*, Jan. 22, 1829.
[2] *United States Telegraph*, Jan. 24, 1829.

Clay wrote to Crittenden: "Should your nomination be rejected, the decision would be entirely on party grounds, and ought, therefore, to occasion you no mortification. . . . Besides the general party grounds, there are two personal interests at work against you — one is that of Mr. [George M.] Bibb, the other that of Mr. [Hugh L.] White of Tennessee. If General Jackson has to make a nomination, I think it probable that the Tennessee man will get it. Cultivate a calmness of mind and prepare for the worst event." [1]

On February 12, 1829, the Democratic Senate, by a vote of twenty-three to seventeen, declared that it was inexpedient to act upon the nomination; and Crittenden wrote to Clay: "I can smile, though there may be some ire mixed with it, at the political game that is now playing." [2] The inauguration of President Jackson found the vacancy still unfilled and there was considerable doubt as to his probable choice. It was reported that John Rowan (Senator from Kentucky and a bitter opponent of the Court's constitutional doctrines) would be the nominee.[3] Rowan himself favored Judge Hugh Lawson White of Tennessee.[4] Jackson, however, was at first determined to appoint William T. Barry of Kentucky. Finally, he decided upon John McLean of Ohio, who had been a very able Postmaster-General under President Adams, but who was not in entire sympathy with Jackson's political policy as to removals,

[1] *Life of John J. Crittenden* (1871), I, 73, by Ann M. B. Coleman.

[2] Crittenden had written to Clay, Jan. 16, 1829: "Whatever may be the fate of my nomination in the Senate, I am prepared to bear it with becoming fortitude and resignation, though in rejection there is a taste of dishonor which my nature revolts at." *John J. Crittenden Papers MSS.*

[3] *National Gazette*, March 4, 1829, quoting Washington correspondent of *New York Commercial Advertiser*. Jackson was also considering John Pope, a former Senator from Kentucky. See *Jackson Papers MSS*, letter of Pope to Jackson, Feb. 19, 1829.

[4] See letter of James A. Hamilton to Martin Van Buren, Feb. 27, 1827. *Van Buren Papers MSS.*

and hence unsuitable for retention in his Cabinet.[1] Desiring first to assure himself that "McLean would not continue to be a candidate for the Presidency and make his official influence a means of promoting his success and thereby impairing the dignity of the office and the Court", Jackson consulted with his friend, James A. Hamilton, who advised the President to send for McLean, and to say that "he contemplated nominating him for Judge, but that he had, perhaps, peculiar views in regard to the course to be pursued by judicial officers; that he considered them as Ministers of the Temple of Justice, and that as such, they were necessarily separated from all party politics or feelings." [2] Jackson followed this advice, sent for McLean, and on March 6, 1829, nominated him as Judge. The appointment was a surprise to all, Democrats and Whigs alike. "It

[1] *Reminiscences of James A. Hamilton* (1869), 100. As early as 1827, it had been supposed that President Adams would appoint McLean to the Supreme Court, and Clay had written to Francis Brooke, Feb. 21, 1827, that speculation had it that "McLean is to continue as Postmaster General or to be put upon the Bench of the Supreme Court."

[2] James A. Hamilton wrote to Van Buren, March 6, 1829, an interesting account (not hitherto published) of the manner in which the appointment was made:

"The P. M. G. was also nominated for a Judge of the Supreme Court. It will be taken up tomorrow and passed. This new arrangement happened as follows. He suggested yesterday through a friend, Ingham, that he desired that place. It was well received and immediate measures taken to induce the Kentucky Delegation to acquiesce. The Gen'l gave Moore to me. I called upon him before breakfast (a man is less proud with an empty than a full belly). I talked the whole matter over and he sent a message to the General which was satisfactory. Bibb was in favor of it and the matter was immediately decided, McLean sent for, and the work done. Branch, Eaton and Berrien supposed not to have been in favor, because, as is said, they supposed it would weaken the Cabinet. My desire was: first to avoid Barry who was too much a partisan, a Relief man, and to whom there would have been much opposition; next to restore, instead of again wounding, the public confidence. This choice will have the first; the former would have had the latter effect, and lastly I wished to remove him from the Cabinet and from the contest. Calhoun is cut up by this measure as is very manifest. He begins to feel that there is an influence beyond, that he can hope to exercise. Barry will be P. M. G." *Van Buren Papers MSS.*

James M. Clayton wrote to Caleb S. Layton, March 9, 1829: "Barry was preferred to McLean of Ohio for P. M. G. because the latter declared he would not proscribe. McL., therefore, was transferred to the Bench to make way for a 'whole hog' man." *Clayton Papers MSS.*

came like a thunderclap upon the Senate," wrote Hamilton, "and was stunning to Calhoun, who hoped that, with the Postmaster-General in the person of McLean, . . . he could have some influence or perhaps constraint." There was, however, very general satisfaction; and even Whig papers spoke of McLean's "urbanity as well as his energy, his resistance of proscription, his sense of justice and his impartiality"; and said: "If Mr. McLean is such a man as we have been led to suppose, notwithstanding the great loss which will be experienced by his removal from his former office, the country will still gain by it. We presume he is too sound a man, both in principle and intellect, to countenance the deep-laid scheme of breaking down the Judiciary. If we form a just estimate of his character in this respect, his recent appointment is a measure of great importance to the safety of the government and the welfare of the Union." [1] Judge Story, whose relations with Jackson were not cordial and who might have been supposed to be antagonistic to the new appointee, wrote: "It is a good and satisfactory appointment, but was, in fact, produced by other causes than his fitness, or our advantage." "The truth is," Story continued, "a few days since, he (McLean) told the President that he would not form a part of the new Cabinet, or remain in office, if he was compelled to make removals upon political grounds. The President assented to the course, but the governing ultras were dissatisfied, and after much debate and discussion, Mr. McLean remaining firm to his purpose, they were obliged to remove him from the Cabinet, and to make the matter fair, to appoint him (not much to his will) a Judge." [2] The new appointee was forty-

[1] *National Intelligencer*, March 9, 1829; *New York Daily Advertiser*, March 11, 1829.

[2] *Story*, I, 564. See *J. Q. Adams*, VIII, March 14, 1829: "I told the Judge (McLean) that as the Senate had not thought proper to confirm the nomination

four years old; he had served as a Judge of the Ohio Supreme Court from 1816 to 1822, and as Postmaster-General under Presidents Monroe and Adams.

Meanwhile the Court, pending the filling of the vacancy, was having difficulty in performing its duties; for on the day for the convening of the 1829 Term (January 12) only Judges Story and Washington were present; Duval and Thompson were detained by illness, and Johnson by accident due to the upsetting of a stagecoach in North Carolina.[1] Finally, after nearly three weeks' delay, six Judges appeared and arguments were begun, on February 28, by Robert Y. Hayne against Hugh Legaré and Cruger (all of South Carolina) in one of the most important of the Court's constitutional cases, *Weston* v. *City Council of Charleston*, 2 Pet. 449, involving the power of the city to tax stock of the United States.[2] Singularly, Hayne, whose

of J. J. Crittenden, made by me, I was much rejoiced at hearing of his appointment. He said it had not been agreeable to himself — which is well known. He was removed from the Post Office because he refused to be made the instrument of that sweeping proscription of postmasters which is to be one of the samples of the promised reform."

James A. Hamilton's version of the episode was as follows: "The day before the nomination was to be made, Ingham, at McLean's instance, called upon the President and told him that the Postmaster-General would like to take the office of Judge and urged again the peculiar delicacy of his situation as Postmaster-General in regard to removals. The President sent for me, told me of this intimation and asked my opinion. I immediately said of all things, it was best, and nothing should be left unattempted to accomplish it." See also a lively description of the episode in *Reminiscences of Sixty Years at the Metropolis* (1886), by Ben Perley Poore. The correspondent of the *Boston Courier*, Feb. 27, 1829, writing Feb. 21, said that it had been "a week of speculation" in Washington, and that "it is not only our concern to enquire 'Who is in the Cabinet today?' but 'What is to be done with Mr. McLean today?'"

[1] *National Intelligencer*, Jan. 13, 17, 1829, Congress was forced to pass a special act, providing that if less than four Judges were present at the sitting of the Court, they might adjourn from day to day for twenty days from the opening of the Term, and if a quorum were not then present the Court should adjourn for the year. *20th Cong., 3d Sess.*, Jan. 20, 21, 1829.

[2] The case had been argued at the previous Term by the same counsel. The *Baltimore Patriot*, quoted in *Charleston* (S. C.) *Courier*, March 5, 1829, said: "In the Supreme Court during the present Term, I have carefully noticed the many gentlemen at its Bar, and could not shut my eyes to the very great advantages of a liberal education and opportunities of study. In Mr. Legaré of Charleston, for

name, two years later, was to become widely known as the defender of Nullification in the famous debate on the Foote Resolution, argued in this case in behalf of the National powers, while Legaré, who later became Attorney-General of the United States, made an extreme plea for State-Rights, saying: "The doctrine that interference with Federal powers will suffice, by implication, to neutralize or even annihilate State-Rights is startling in itself, and most pernicious when carried out to its legitimate results. The degree of interference being unsettled and incapable of adjustment, however slight or shadowy it may be, the issue can never be started but to a fatal issue." The Court, in an opinion rendered on March 18 by Chief Justice Marshall (Johnson and Thompson strongly dissenting), held the tax repugnant to the Constitution as an interference with the power of the United States to borrow: "a power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free exercise of which the interests certainly, perhaps the liberty of the whole may depend."

While this decision was a further bulwark to the Federal Government against encroachments by the States, it also added more fuel to the flames of opposition to the Court's Nationalistic attitude in cases affecting the assumed rights of the States. That the Court, however, was not inclined to push to an extreme its

example, there is an instance of a young gentleman on his first visit in this city and first appearance in this Court, astonishing the enraptured audience, surprising his seniors and eliciting smiles of approbation from the grave members on the Bench. It was a genius, prepared by education, reaping a full harvest of reputation."

It is interesting to note that at this period, it was a frequent occurrence for the argument of a case to be interrupted by other cases, and to be resumed at a later day. In this case, in 1829, there was an interruption of ten days, Hayne opening on Feb. 28, and Legaré closing on March 10. Decision was rendered only eight days later March 18.

broad construction of the Constitution, in cases which did not involve conflict between the National and State supremacy was clearly shown in three other interesting cases decided at this Term. In *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet. 245, argued by Richard S. Coxe against William Wirt, and involving a statute of Delaware authorizing a dam on a navigable river, Chief Justice Marshall held, that, inasmuch as Congress had passed no law in execution of its power to regulate commerce on such small navigable creeks (which abound throughout the lower country of the Middle and Southern States), the Delaware statute would not, "under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." To reconcile this expression as to the "dormant state" of Congressional power, with the broad lines of the decision in *Gibbons* v. *Ogden*, five years before, became a difficult task in later years; and for a long time produced great uncertainty in the whole law of interstate commerce.

In *Satterlee* v. *Matthewson*, 2 Pet. 380, a Pennsylvania statute had been attacked as impairing the obligation of contract. It was particularly for its decisions on this clause of the Constitution that Southern and Western Congressmen, and even Van Buren of New York and Holmes of Maine had assailed the Court in the Senate, three years before, and again this year. The Court now held the statute in question to be merely retrospective but not an impairment of any contract; and it stated that a Legislature had the power to create a contract between parties where none previously existed — even though such legislation might be censured as "an unwise and unjust exercise of legislative power." "To create a contract and to destroy or impair one," it said,

do not "mean the same thing." [1] A similar decision was rendered in *Wilkinson* v. *Leland*, 2 Pet. 627, argued by Wirt against Webster, in which a retrospective law of Rhode Island was sustained as constitutional, Judge Story remarking that while such legislation presented "danger, inconvenience and mischief", yet its validity must be decided "not upon principles of public policy, but of power." [2]

One other case at this Term deserves note; for in view of the fact that the question of slavery and the status of the slave had been for years the subject of heated political discussion, it is singular that it had been involved in no case before the Court until it now arose in a peculiar fashion in *Boyce* v. *Anderson*, 2 Pet. 150. The question presented was, whether a slave drowned in an accident to a steamboat was a passenger or merchandise freight, for which the steamboat company was to be liable as a common carrier. "In the nature of things," said Marshall, "and in his character, he resembles a passenger, not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than that which is applicable to the carriage of common goods." This decision was not agreeable to the slave owners, who regarded slaves as property merely, and

[1] This case involved the famous Connecticut Settlers' claims which had been involved in *Van Horne* v. *Dorrance*, in 1795.

[2] Salmon P. Chase (then a student in Wirt's office) in his *Diary*, Feb. 14, 1829, gave a striking account of Webster's argument in this case: "He states his case with great clearness and draws his inferences with exceeding sagacity. His language is rich and copious; his manner, dignified and impressive; his voice, deep and sonorous; and his sentiments high and often sublime. He argues generally from general principles, seldom descending into minute analysis where intricacy is apt to embarrass and analogy to mislead. He is remarkable for strength, rather than dexterity, and would easier rend an oak than untie a knot. If I could carry my faith in the possibility of all things to labor — so far as to suppose that any degree of industry would enable me to reach his height, how day and night would testify of my toils!" *The Private Life and Public Services of Salmon Portland Chase* (1847), 165, by Robert B. Warden.

who had insisted that the absolute liability of carriers of property should be applied; but the Court said that the rule relating to conveyance of goods had been established "as commerce advanced, from motives of policy", and that it did not apply to the conveyance of slaves.

Before the opening of the 1830 Term, another vacancy on the Bench was caused through the death of Judge Bushrod Washington, after a long service of thirty-two years. To succeed him, three lawyers from Pennsylvania were considered by President Jackson: Horace Binney, who had the enthusiastic support of the Philadelphia Bar;[1] John Bannister Gibson, then Chief Justice of Pennsylvania, who was favored by Calhoun; and Henry Baldwin, who was indorsed by most of the Pennsylvania Bench and Bar outside of Philadelphia and by a large majority of the Legislature.[2] Baldwin was fifty years of age; he had served for six years in Congress with great distinction as Chairman of the Committee on Manufactures, his reports on the doctrine of protective tariffs being regarded as the standard authority;[3] and he had been Jackson's first

[1] Binney wrote: "My friend Baldwin got it, and I saw his letter to my friend Chauncey in which he did me the honor to say that I deserved it, but he *wanted* it more." William Wirt told Binney that President J. Q. Adams had intended to appoint Binney if Judge Washington had died during the Adams Administration. *Life of Horace Binney* (1903), by Charles C. Binney.

[2] As reported in the *Pittsburgh Statesman* "four out of five of the people of Kentucky, Ohio, Indiana and Pennsylvania are warmly and strongly in his favor."

[3] See interesting speech on Baldwin by Dudley Marvin of New York in the House, Dec. 19, 1848. *30th Cong., 2d Sess.*, and see *The Forum* (1856), by David Paul Brown, II, 76. For details as to the conflict over the appointment, see *New York Daily Advertiser*, Dec. 8, 1829, Jan. 9, 1830; *United States Telegraph*, March 28, Dec. 7, 12, 30, 1829. The Washington correspondent of the *Boston Courier*, Jan. 16, 1830, said: "A general topic of conversation is the blow which it is supposed has fallen upon Gen. (Duff) Green, the editor of the *Telegraph* in the appointment of Mr. Baldwin. It appears that Mr. Van Buren is lopping off some of the excrescences of the Administration party and is endeavoring to cultivate the vast estate to which he is heir-apparent. The nomination and appointment of Mr. Baldwin . . . so soon after the bitter denunciation in the *Telegraph* must convince the editorial General that his influence over the Executive General is on the wane."

choice for Secretary of the Treasury, but his close friendship with Clay and the opposition of Calhoun made his appointment inadvisable. Now, he was violently opposed again by the Calhoun Democrats; but Jackson, determined not to yield a second time, appointed him as a Judge, on January 4, 1830. "It is a step which will create no inconsiderable sensation," wrote Van Buren. "Mr. Baldwin of Pittsburg is to be the new Judge, *vice* Washington. This is another escape," wrote Webster. "We had given up all hope of anything but Chief Justice Gibson's nomination. Mr. Baldwin is supposed to be, substantially, a sound man, he is undoubtedly a man of some talents." [1] The Democrats were by no means satisfied, and were inclined to fight the appointment; but the fact that Calhoun was opposed to Baldwin, led to his speedy confirmation, the only votes cast against him being those of the South Carolina Senators, Hayne and Smith.[2] The whole episode was an eminent example of Jackson's independence of character; and the appointment received general approbation even from his political opponents. It is "both good and popular," said the Whig *New York Daily Advertiser*. "It was quite satisfactory to those who wish well to the country and the Court," wrote Judge Story. "Mr. Justice Baldwin is thought to give promise of being a very good Judge," wrote Webster. Even John Quincy Adams, who seldom could see any good in an act of Jackson, wrote: "Judge Baldwin paid me a short visit. This is another politician of equivocal morality, but I hope

[1] *Reminiscences of James A. Hamilton* (1869); *Webster*, XVI, letter of Jan. 6, 1830.

[2] *New York Daily Advertiser*, Jan. 11, 1830. In *The Chief Phases of Pennsylvania Politics in the Jacksonian Period* (1919), by Marguerite G. Bartlett, an account is given of Calhoun's efforts, aided by Ingham, Branch and Berrien, to control Pennsylvania, in the interest of his nomination for the Presidency. Baldwin was confirmed, Jan. 6, 1830, by a vote of 42 to 2.

will make a more impartial Judge. I told him I had been gratified by his appointment — which was true; because I had dreaded the appointment of Gibson, the Chief Justice of Pennsylvania, precisely the most unfit man for the office in the Union." [1] The opposition to Gibson, it may be noted, was partly due to the fact that at this time (though he later changed his views) he was strongly opposed to the right of the Judiciary to pass upon the constitutionality of statutes; and it was chiefly owing to his attitude on this question that he was supported by the extreme State-Rights and Nullification faction.[2]

The 1830 Term, at which the new Judge, Baldwin, first took his seat, may with justice be called Daniel Webster's Term. Not only did he appear as counsel on one side or the other of most of the cases of importance, but it was largely due to his unanswerable defense of the Court as an indispensable feature of the American system of Government, made in the famous reply to Hayne which he delivered in Congress at this Term, that the Court was placed in a more impregnable position in the confidence of the people than it had been during the past thirty years. While the cases decided at this Term involved questions of great magnitude and interests of immense monetary values, such as *Inglis* v. *Trustees of Sailors Snug Harbor*, 3 Pet. 99, on which Webster wrote: "I have made a greater exertion than

[1] *Story*, II, 35, letter of Jan. 31, 1830; *Webster*, XVII, letter to Jeremiah Mason, Feb. 27, 1830; *J. Q. Adams*, VIII, Jan. 17, 1830.

[2] Gibson was born in 1780, was Chief Justice of Pennsylvania from 1827 to 1851, and died in 1853; he delivered a dissenting opinion in *Eakin* v. *Raub*, 12 Serg. Rawle, 320, in 1825, opposing judicial power; but in 1845, in *Norris* v. *Clymer*, 2 Pa. St. 277, 281, he said: "I have changed my opinion for two reasons: the late Convention by their silence sanctioned the pretensions of the Courts to deal freely with the acts of its Legislature; and from experience of the necessity of the case." See *Law Reporter* (1855); *Life, Character and Writings of John B. Gibson* (1855), by William A. Porter; *Memoirs of John Bannister Gibson* (1890), by Thomas P. Roberts; *Gibson and Progressive Jurisprudence, Penn. Bar Ass.* (1909); *John Bannister Gibson*, by Samuel D. Matlack, *Great American Lawyers*, III.

in any other case since Dartmouth College or than it is probable I shall ever make on another," [1] and such as *Carver* v. *Johnson ex dem. Astor*, 4 Pet. 1, settling the title to a valuable tract of 51,000 acres in the State of New York claimed by John Jacob Astor, few of the decisions had a permanent effect on the constitutional history of the country. One case, however, is to be noted as significant of the fact that the changed conditions, the new spirit of the times and the immense development of banking and other corporations during the past decade had led the Court to consider with more care the scope and effect of the views as to corporate charters which it had first announced, in 1819, in the *Dartmouth College Case*. In *Providence Bank* v. *Billings*, 4 Pet. 514, it now showed that it was unwilling to enlarge the rights of corporations by any further extension of the doctrine of the earlier case. It upheld a Rhode Island statute taxing the capital stock of a bank; and it decided that, unless a charter contained an express agreement on the part of the State not to tax a corporation, none could be implied; and that though the power to tax might be abused so as to destroy the charter, the Constitution "was not intended to furnish the corrective for every abuse of power which may be committed by the State governments. The interest, wisdom and justice of the representative body and its relations with its constituents, furnish the only security, where there is no

[1] *Inglis* v. *Sailors Snug Harbor* may be noted as being (according to Wirt's statement) the first case before the Court in which a reargument had been asked for after the decision. It had been argued in 1829 by Webster and David B. Ogden against Wirt and Samuel L. Talcott. Judges Trimble and Washington having died, it was reargued in 1830, and decision was rendered against Webster, who then asked for a rehearing and was denied. Of the *Astor Case* it may be noted, as a sequel, that New York by an Act of the Legislature finally paid Astor $500,000 for a surrender of his claim; see *Niles Register*, XXXIV, 235. For other cases involving the Astor title, see *Crane* v. *Lessee of Morris* (1831), 6 Pet. 598; *Kelly* v. *Jackson ex dem. Morris*, 6 Pet. 622.

express contract, against unjust and excessive taxation, as well as against unwise legislation generally." This decision, said a prominent Whig paper, "has excited much attention, interest and approval. It is particularly opportune and of a sound constitutional purport." [1] Furthermore, as it was rendered in the midst of the criticisms of the Court in the debate on the Foote Resolution, and at a time when President Jackson was beginning his determined warfare on the Bank of the United States and allied banking interests, the decision was welcomed by the Democrats. It thus strengthened the Court with both parties.

It was exactly two months before the rendering of the decision in the *Providence Bank Case* that the famous debate arose in the Senate on the Foote Resolution relative to the disposition of public lands; and in its course, a violent attack was directed at the scope of the Court's judicial power — a topic which, as Senator Foote plaintively remarked, had been unnecessarily "spliced upon his Resolution." This attack grew out of an argument over the right of a State to refuse obedience to Federal laws, whose constitutionality should be upheld by the Court but denied by the State. As at the time of the Virginia-Kentucky Resolutions, so now, there was no alarm over decisions of the Court holding Acts of Congress invalid, nor were any doubts uttered as to the Court's right to exercise such power. But for the past decade, and especially during the last three years, constant apprehensions had been voiced by the Democrats at the encroachments by Congress on State sovereignty, supported by the broad construction of the Constitution by the Court. Of the criticisms on the Court in this connection, the following may be

[1] *National Gazette*, March 13, 1830. See articles on the case in *United States Intelligencer* (1830), II.

taken as typical. In the Bankruptcy bill debate, in 1827, Senator John McKinley of Alabama (destined to become a Judge of the Court, ten years later) said that while he held its decisions in the highest respect and considered the Chief Justice one of the ablest Judges in the world, "such appears to be the political bias of a majority of that Court and the great authority of its decisions upon constitutional law, that the powers of the Federal Government are, by mere construction, made to overshadow State powers and render them almost contemptible." [1] In 1826, in the debate on the Judicial Process bill, Senator Rowan of Kentucky made a furious attack on the Court, stating that the liberties of the people were being endangered by its decisions, and he "did not rate very highly that sanctity which was unceasingly employed in profaning the State laws and the State authorities." [2] In the debate, in 1828, on the Internal Improvements bill, Senator Smith of South Carolina said that should Congressional power construed by the Court continue to advance, it would soon be "more unlimited than any monarch in Europe and one which would shake the Government to the centre"; and Philip P. Barbour, a Virginia Congressman (who was appointed a member of the Court, nine years later) said: "This tribunal in construing the Constitution have enlarged the sphere of its action, in my estimation, to an indefinite extent beyond what was in the contemplation of those who formed it. . . . By construction, a breach may be made in the Constitution by which not only these powers may be let in, but a flood of others, strong enough to break down all the barriers erected to preserve the residuary rights of the States and the People. . . . The danger is that construction will find

[1] *19th Cong., 2d Sess.*, Jan. 27, 1827.
[2] *20th Cong., 1st Sess.*, Feb. 21, 1828

its way to the vitals of the Constitution."[1] In the debate on the Tariff bill, in 1828, Mark Alexander, a Virginia Congressman, said that now the Government under the Constitution, "so far from being a charter of delegated powers, . . . was a monarchy in disguise; it was anything a majority of Congress might choose to make it", and that he "never expected to see the Supreme Court ever declaring a law of Congress unconstitutional which accumulates power in the Federal head."[2] In the Cumberland Road bill debate in 1829, James Buchanan said that "jealousy of Federal power is now the dictate of the soundest patriotism."[3] In the debate, in 1829, on his bill to require concurrence of five out of seven Judges in any decision involving a constitutional question, Philip P. Barbour said that it was necessary to allay popular discontent with the Court, and to produce "an increased degree of contentment and of confidence in the decisions of that dread tribunal", and to fence around with proper guards a power so tremendous as that of "nullifying" the legislation of the Union of the States.[4] In December, 1829, Worden Pope, a close friend of President Jackson in Kentucky, wrote to him that: "The Federal Courts should be limited to matters arising only out of the Constitution and the law merchant. . . . The *lex loci* of the States must in private rights govern

[1] *20th Cong., 1st Sess.*, April 11, 1828; Feb. 26, 1828. See on the other hand, speeches in the House of Charles F. Mercer of Virginia, Feb. 26, and of John Carter of South Carolina, Feb. 28, 1828, defending the Court from the charges of unduly enlarging the boundaries of Federal power and usurping the reserved powers of the States.

[2] *20th Cong., 1st Sess.*, April 29, 1828.

[3] *20th Cong., 2d Sess.*, Feb. 2, 9, 10, 1829; and see especially speeches of Stevenson of Virginia and Daniel of Kentucky.

[4] *20th Cong., 2d Sess.*, Jan. 2, 21, 1829; *App.*, Jan. 2, 1829. A Massachusetts Congressman opposed a motion to print this report on the ground that if the bill should not pass, "the public circulation of such a report was calculated to spread discontent in the public mind and shake the confidence of the people in the Judiciary."

the decisions of the Federal tribunals. . . . The present collisions and evils exist in the present jurisdiction of those tribunals; and the remedy will be found alone in its reduction to National principles and interests. The whole seven Judges should be unanimous in deciding against the validity of a State Constitution or law. Sooner or later the jurisdiction of the Federal Courts must be curtailed, and we had better at once cut off every graft or inoculation upon the roots or trunk of the constitutional judicial tree. It is a dangerous encroaching power and ought thus to be limited. . . . The District Judges and all Federal officers, to obey the State laws until decided against by the unanimous judgment or decree of the Supreme Court." [1] In 1830, at the very time when the debate over the Foote Resolutions was in course, Congress was considering again the proposition to create two additional Supreme Court Judges and two new Circuits; and James Buchanan of Pennsylvania in arguing for retention of Circuit Court duty by the Judges spoke of the fact that in many States the people had been taught to consider them "with jealousy and distrust." [2] In addition to this dissatisfaction with the Court's doctrines, the advent of the Jackson

[1] *Jackson Papers MSS*, letter of Dec. 25, 1829.

[2] *21st Cong., 1st Sess.*, Jan. 14, 19, Feb. 16, 17, March 10, 1830. The leading arguments in favor of the bill were made by James K. Polk of Tennessee, Charles A. Wickliffe of Kentucky and James Buchanan of Pennsylvania; those against the bill by Jabez W. Huntington of Connecticut. A curious amendment was suggested by James Strong of New York, to abolish the Circuit Courts entirely and to have the Supreme Court sit in Washington in January, and in Philadelphia in August. Political considerations affected this much-needed reform; for it was defeated by the North and East out of fear of allowing President Jackson to appoint the new Judges. John Quincy Adams in his *Memoirs*, VIII, March 22, 1830, says that he was opposed to the bill "considering upon whom the appointments would probably fall." On the other hand, James K. Polk of Tennessee in debate ridiculed these fears saying: "Some gentlemen seem to have great apprehension, if this is increased by the appointment of additional Judges from the West, that it will be innoculated with Western opinions and Western doctrines. Are gentlemen prepared to say that the opinions, the legal opinions . . . and the constitutional doctrines of the West are less authentic or more unsound than the opinions of other portions of the Union?"

Administration in 1829, the accompanying general upheaval of political conditions in the country and the rise of bitter partisanship had imbued the leaders of the Democratic Party with the idea that the Court, in spite of the fact that five of its seven members had been appointed by Democratic Presidents, was partisan in its support of views obnoxious to the Democracy. Its decisions were attributed to political causes. The Chief Justice, whose scrupulous abstention from taking part in any political movement had hitherto been unquestioned, was now attacked as a politician, because of a statement, falsely attributed to him but categorically denied by him in the Jackson campaign, to the effect that, should Jackson be elected, he would "look upon the government as virtually dissolved." [1] "The Judges are all ultra-Federalists but W. Johnson, and he is a conceited man, and without talents," Dr. Thomas Cooper, President of South Carolina College, had written to Mahlon Dickerson, Senator from New Jersey. "If the power of the Judiciary be not curtailed, the liberties of the people are gone. To make every class of constitutional authorities subservient to a power under Presidential bias, if not controul, placed far above and aloof from the people . . . thus to construe the Constitution, is to make it whatever the Judges chose to make it. . . . When you add to this influence, the sweeping power under General Welfare and the United States Bank, I am tempted to exclaim *c'en est fait de nous.*" [2] Louis McLane, a former Senator from Delaware and recently appointed Minister to England, wrote to Martin Van Buren, expressing his fears that the Court must be preserved "from the taint of party." "You fear Judge Marshall," he said. "I fear a thousand times more

[1] For full account of this episode, see *Marshall*, IV, 463–465.
[2] *Amer. Hist. Rev.* (1901), VI, 729, letter of Aug. 31, 1826.

Judge Story and a line of such miserably frivolous bookworms, destitute of solid understanding, which the effervescence of party and the course of things may throw upon the Bench. . . . I fear Judge Story is but the wretched tool of Mr. Webster." [1] McLane then proceeded to state that if there was "any one source of peculiar danger to the harmony and tranquillity of our Union, it is in my opinion, in the loss of public confidence in the Judiciary. I may be pardoned for adding that, with all Mr. Jefferson's claims to the admiration and gratitude of his country, he is on that score not free from blame. He did much to inspire a jealousy of that tribunal which will never be cured. The Court itself, by travelling out of the record to decide constitutional questions always in favor of the powers of the National Government, and in resisting unjust restraints upon its legitimate powers, usurping powers of the most dangerous scope, naturally encouraged this jealousy." Though he believed that the want of confidence in the Judiciary proceeded now, "not so much from any actual abuse or any crying usurpation, as from an apprehension of what may come, and a fear that with the extravagant powers now claimed, without a greater check and responsibility, it may materially enable Congress to change the Constitution", he believed it necessary to provide some check "which should give the people some better control over the tenure of the office." As a remedy, McLane said that he considered the power of impeachment to be "absolutely worthless"; and that a power of removal on address of Congress would be dangerous, as with the Court a creature of the majority in Congress, there would be no limit to the powers of the General Government or to the "danger of usurpation on the part of the forefoot." The cure which he advo-

[1] *Van Buren Papers MSS*, letter of July 20, 1830.

cated was original and unique, namely, to empower the President to remove Judges of the Court upon the address of the Legislatures of two thirds of the States of the Union. Such a change in the Judiciary system, he said, would be "more potent than any other means to preserve the Bench from the taint of party."

It was under such circumstances and amid such sentiments prevalent in the Democratic Party, that, on January 19 and 25, 1830, Robert Y. Hayne of South Carolina, in debating an innocuous resolution regarding public lands, advanced the theory of the right of State veto on laws deemed by a State to be palpably unconstitutional but which had been held valid by the Court; it was as a remedy or corrective for judicial support of Congress that he urged Calhoun's new doctrine of Nullification. While Webster's famous Reply to Hayne, delivered on January 26 and 27, has rung through the annals of American history as the keynote of American Union, it constituted at the same time an unanswerable defense of the functions of the American Judiciary.[1] And in this speech, and in the debate which ensued during the following three months, the fundamental principles of the American judicial system were discussed, both by its advocates and adversaries, with an illuminating thoroughness never equaled on the floor of Congress. The Court's alleged encroachments on the States, its support of unwarranted Congressional powers, and its alleged assumption of jurisdiction of political questions affecting State sovereignty became

[1] It is interesting to note that Webster made his famous Reply on Jan. 26, 27, during an interval in the argument of one of his most important cases in the Court, *Carver* v. *Johnson ex dem. Astor*, 4 Pet. 1, which was argued Jan. 20, 21, 22, 23, by Ogden and Bronson, and after a lapse of ten days on Feb. 3, 4, by Wirt, and on Feb. 4, 5, 8, by Webster. Moreover, on the day after his Reply to Hayne, Webster argued in *Bell* v. *Cunningham*, 3 Pet. 69, and on the next succeeding days, on Jan. 28, 29, in *Parsons* v. *Bedford*, 3 Pet. 433, on Feb. 1, in *Amer. Ins. Co.* v. *Canter*, 3 Pet. 307, and on Feb. 9, in *Harris* v. *Dennie*, 3 Pet. 292.

the subject of especially heated criticism by the following Senators.[1] Thomas H. Benton of Missouri stated that the "despotic power over the States" claimed by Webster for the Court was "a judicial tyranny and oppression", and that: "The range of Federal authority is becoming unlimited under the assumption of implied powers. . . . It will annihilate the States and reduce them to the abject condition of provinces of the Federal empire." John Rowan of Kentucky said that Webster's view of the Court "will lead to the consolidation of the Government" and that: "The State cannot submit its sovereignty to judicial control. . . . When the Court asserts its right to impose restraints upon the sovereignty of the States, it should be treated as a usurper, and driven back by the States within its appropriate judicial sphere"; and he concluded: "I view the State sovereignty as the sheet-anchor of the Union. I look to the States and not to the Supreme Court for its strength and perpetuity. There is no danger of the States flying off from the Union; you may possibly drive them off, by attempting to prostrate their sovereignty and make them vassals of the Supreme Court or provinces of the General Government." Levi Woodbury of New Hampshire (who fifteen years later became a member of the Court) said that he did not fail in respect for the great personal worth of the Judges but that since 1803, the Court had "evinced a manifest and sleepless opposition, in all cases of a political bearing, to the strict construction of the Constitution adopted by the democracy of the Union in the great Revolution of 1801. I say nothing now against the honesty or legal correctness of their views in adopting such a construction. I speak only of the matter of

[1] *21st Cong., 1st Sess.*, speeches of Benton, Jan. 18, Feb. 2, Hayne, Jan. 19, 25, 27, Rowan, Feb. 8, Woodbury, Feb. 24, Smith of South Carolina, Feb. 26, Grundy, March 1, 1830.

fact . . . of this sliding onward to consolidation, this giving a diseased enlargement to the powers of the General Government and throwing chains over State-Rights, chains never dreamed of at the formation of the General Government." Felix Grundy of Tennessee said that he respected the Judges, and would defend "their independence as final arbiter of individual rights, but not of the sovereign rights of the States." None of these critics appeared to comprehend the fact that the Court did not, in fact, act directly on the States or assume jurisdiction of mere political questions, but that in a case arising between individuals or in criminal prosecutions involving individual rights and liabilities, the Court was compelled to construe the Constitution and the law in order to determine such rights and liabilities, regardless of the fact that its construction might affect some question regarding which political controversy had arisen. It was this misunderstanding which impelled Hayne to say: "It is not my desire to excite prejudice against the Supreme Court. I not only entertain the highest respect for the individuals who compose that tribunal but I believe they have rendered important services to the country. . . . I object only to the assumption of political power by the Supreme Court, a power which belongs not to them and which they cannot safely exercise."

The replies made by the defenders of the Court were ardent and conclusive.[1] Webster's great argument was followed by David Barton of Missouri in an able speech, arraigning "the attacks of this debate upon the sheet-anchor of the vessel of State, the Supreme Court — the great, common tribunal of the States of this Union." He deplored "the ease with which it

[1] *20th Cong., 1st Sess.*, speeches of Webster, Jan. 20, 26, 27, 1830, Barton, Feb. 9, John Holmes of Maine, Feb. 19, Clayton, March 4, Livingston, March 15, Johnston, March 30, April 2, Robbins, May 20, 1830.

may be rendered odious, by making it a topic of party and electioneering discussion, and representing it to the people, who have the least means of judging it, as a despotic department of the Government, changing the relative powers of the States and the Union and harboring designs of consolidating the Government into one single empire. By depriving it of the confidence of the public it loses its great utility in quieting instead of inflaming the public mind, when it decides any of the important questions and principles of our yet young government of the Union. I enter my protest against making the Judiciary of the United States the topic of mere party denunciations and popular declamation." John M. Clayton of Delaware said that there was no other direct resource "to save us from the horrors of anarchy than the Supreme Court", and that while "it would seem that in their turn most of the sisters of this great Family have fretted for a time, sometimes threatening to break the connexion and form others, in the end nearly all have been restored, by the dignified and impartial conduct of our common umpire, to perfect good humor." Edward Livingston made a superbly able speech, supporting the Court and demolishing, with arguments fully as strong as Webster's, the theory of a State veto on Acts of Congress upheld by the Court. Johnston of Louisiana denounced the "deliberate attempt to undermine the power and destroy the confidence of the country in that great tribunal upon which this Union rests. . . . A Court created by the Constitution, without power or patronage, depending upon its virtues and talents to sustain itself in public opinion and which is essential and indispensable to the Union."

Before the end of this debate on May 22, 1830, and only six weeks after Webster's eloquent defense of the

Judiciary, the Court itself was forced to listen to arguments, bristling with truculent opposition to its authority over the State sovereignties, in the great case of *Craig* v. *Missouri*, 4 Pet. 410. This case, which had been pending in the Court for four years,[1] and had been previously argued in 1828, involved the question whether a Missouri statute authorizing a form of State loan-certificate was in contravention of the prohibition of the Constitution against issue of bills of credit by a State. The point at issue was of vital importance to those who opposed the financial operations of the United States Bank, and who favored currency issuable by the States or by State banks guaranteed by the States. The argument for the State, made on March 3, 1830, by its Senator, Thomas H. Benton, was replete with phrases of indignation at the exercise by the Court of jurisdiction under the 25th Section of the Judiciary Act, and of outrage that any State should be forced by legal process to appear before it. "The State of Missouri," he said, "has been 'summoned' by a writ from this Court under a 'penalty' to be and appear before this Court. In the language of the writ she is 'commanded' and 'enjoined' to appear. Language of this kind does not seem proper when addressed to a sovereign State, nor are the terms fitting, even if the only purpose of the process was to obtain the appearance of the State." The Court's decision, holding the State law invalid, was rendered on March 12, only nine days after the close of the argument, and while the debate on the Foote Resolution was still progressing in Congress. In his opinion, Chief Justice Marshall replied with lofty firm-

[1] See *United States Telegraph*, March 10, 1826, which said that on March 8, the Court ordered *Craig* v. *Missouri* and other similar cases "to be docketed, being of opinion that they were regularly before the Court and that the objections urged on the ground of want of jurisdiction were such as must be taken on the argument and not on motion to dismiss."

ness to Benton's charges, and incidentally to the similar criticisms which were being voiced in the Senate:

In the argument we have been reminded by one side of the dignity of a sovereign State; of the humiliation of her submitting herself to this tribunal; of the dangers which may result from inflicting a wound on that dignity: by the other of the still superior dignity of the people of the United States, who have spoken their will in terms which we cannot misunderstand. To these admonitions, we can only answer that if the exercise of that jurisdiction which has been imposed upon us by the Constitution and laws of the United States shall be calculated to bring on those dangers which have been indicated, or if it shall be indispensable to the preservation of the Union, and consequently of the independence and liberty of these States, these are considerations which address themselves to those departments, which may with perfect propriety be influenced by them. This department can listen only to the mandates of law, and can tread only that path which is marked out by duty.

The decision of the Court, holding the State law invalid, caused great excitement in Missouri, Kentucky and other States in which it was felt that financial distress and panic could only be averted by legislation of this kind placing some form of State guaranty behind the issue of currency.[1] The decision came, moreover, as the climax of the accumulation of grievances which

[1] After the decision in *Craig* v. *Missouri*, Daniel Webster was asked for an opinion with regard to the validity of a law of Kentucky providing for the incorporation of a bank in which the State was the sole stockholder and which issued banknotes, having the security of the State behind them. (See *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257.) He replied in an interesting letter, Feb. 23, 1831, stating that while he would not object to being retained in the case, "there are, however, I think good reasons why I should refrain from giving an opinion on this great question, as preliminary to judicial proceedings. There would, probably indeed, be little value in such an opinion, since the clause of the Constitution, which must be the subject of argument, has been so recently considered and interpreted by the highest judicial authority in the Missouri case. Indeed, sir, whatever my opinion might be, on a full consideration of the case, it seems to me that the respect due from me to the State of Kentucky and her law, and to the great interest she must feel in the question, may justly impose on me a forbearance from expressing such opinion, in advance of the regular forensic discussion." *Letters of Daniel Webster* (1902), ed. by C. H. Van Tyne.

the States felt they were entitled to enter against the Court and its decisions — Virginia's over the exercise by the Court of appellate jurisdiction in her criminal prosecutions; Ohio's over the invalidation of her laws directed against the United States Bank; Kentucky's over her Bank legislation, and the overthrow of her land laws and of her laws protecting debtors; South Carolina's over the conflict between the Court's views as to interstate commerce and her slavery legislation and over the incompatibility of the Court's doctrine with her growing Nullification movement.

In view of these conditions, it was evident to all thinking men that the most critical period in the career of the National Supreme Judiciary had been reached. "The crisis of our Constitution is now upon us. A strong dispensation to prostrate the Judiciary has shown itself," wrote Marshall to Story; and a few months later he wrote that he had read the dissenting opinions of Judges Johnson, Thompson and McLean in the *Craig Case* "and think it requires no prophet to predict that the 25th Section is to be repealed or to use a more fashionable phrase, to be nullified by the Supreme Court of the United States. I hope the case in which this is to be accomplished will not occur in my time, but accomplished it will be at no very distant period." [1] And a leading Whig paper in New York summed up the situation by saying: "It is manifest that there is a settled determination in the minds of some of the warm and violent politicians of the country to circumscribe, if not destroy, the weight and influence of the National Judiciary. . . . So long as the Court maintains its talents, its integrity, and its independence, the great constitutional interests of the State

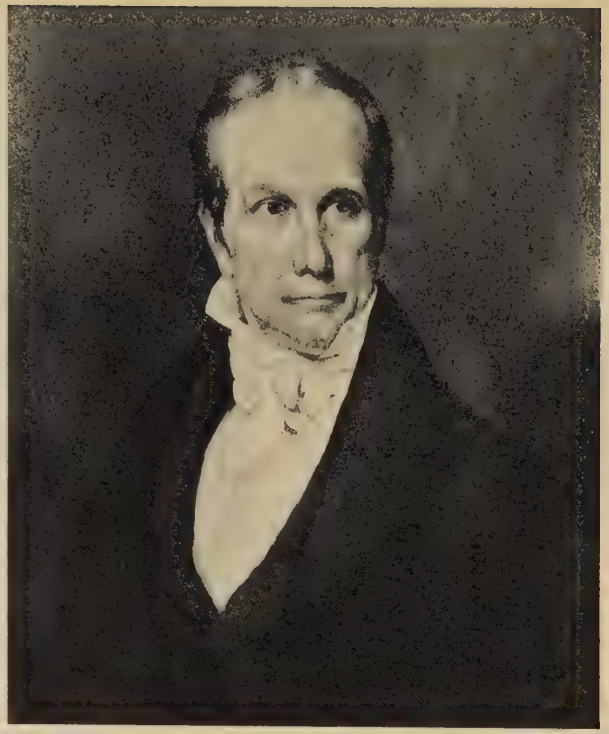
[1] *Story Papers MSS*, letter of Jan. 8, 1830; *Mass. Hist. Soc. Proc., 2d Series*, XIV, letter of Oct. 15, 1830.

are safe. If the Court should be broken down, and the places on the Bench be filled with ignorant or unprincipled men, violent partisans and desperate politicians, the strength and security of the Republic will be undermined, and the very first serious convulsion that occurs will endanger the very existence of the Republic." [1]

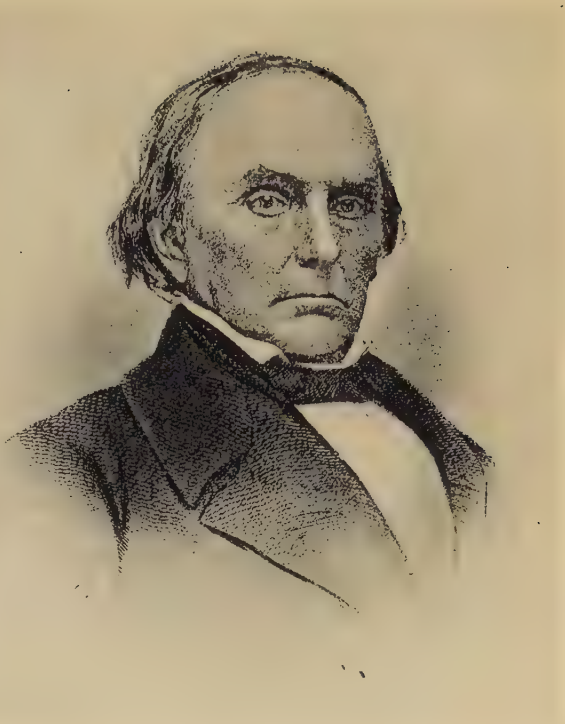
Though these pessimistic predictions appeared, at the time, to be justified, popular confidence in the integrity of the Court sustained it through the two following critical years. No one, however, can overestimate the potent influence in maintaining such confidence which is to be attributed to Webster's soul-stirring appeal in behalf of the Union and judicial supremacy at this particular juncture; and history has confirmed the contemporary view of his great speech — that "if his name were unwritten in the legislative and judicial history of the country . . . he has now inscribed it upon a monument, in letters so legible and so durable that it will be read and remembered, as long as there is an American to read and rejoice in the glory of his country." [2]

[1] *New York Daily Advertiser*, March 19, 1830. See an article containing bitter criticism of the Court, *The Tribunal of Dernier Resort* in *Southern Review* (1830), VI.

[2] *New York Journal of Commerce*, Jan. 28, 1830; *National Gazette* (Phil.), Jan. 29, 1830; *New York Daily Advertiser*, Feb. 26, March 3, 19, 1830; the *National Intelligencer*, Jan. 26, 1830, said it had "never yet heard a speech in all respects equal to that which Mr. Webster has produced." For the fullest and best account of the speech, see the *National Journal*, the Whig paper in Washington, Jan. 27, 28, 29, 30, Feb. 1, 2, 3, 6, 9, March 8, 11, 24, 1830, quoting comments from other newspapers. J. Q. Adams wrote in his diary, Feb. 23, 1830: "It demolishes the whole fabric of Hayne's speech, so that it leaves scarcely the wreck to be seen." On the other hand, the *United States Telegraph*, and the *New York Courier*, both Jackson papers, attacked the speech, terming it full of "dangerous doctrines", which, if successfully established, "would make the General Government an absolute autocracy, lording it over the States and the people. Let Democracy look to it."



HENRY CLAY



DANIEL WEBSTER

CHAPTER NINETEEN

THE CHEROKEE CASES AND PRESIDENT JACKSON

1831–1833

The case which was destined now to bring about the most serious crisis in the history of the Court arose in Georgia and had its roots in a treaty, made forty years prior, between the United States and the Cherokee Indians, a tribe which occupied a tract of country lying within the limits of Georgia, North Carolina, South Carolina, Tennessee and Alabama. In this Treaty, in 1791, the United States "solemnly guaranteed to the Cherokee Nation all their lands not therein ceded." Eleven years later, Georgia, in ceding to the United States all that portion of its territory now constituting the States of Alabama and Mississippi, did so upon the express condition that the United States should extinguish for the use of Georgia the Indian title to lands within the remaining limits of the State, "as soon as it could be done peaceably and on reasonable terms." Unfortunately, the United States failed to perform its agreement; and though, from 1805 to 1819, it purchased over eight million acres from the Cherokees in Alabama and Mississippi, it bought only about one million out of the five million acres owned by that tribe in Georgia. Moreover, it adopted a fostering and humanitarian policy towards the Georgia Cherokees which developed them into a civilized settlement, very little open to persuasion, and very little desirous to emigrate. The increasing permanency, however, of an Indian tribe within its borders, claiming and exercising a totally independent govern-

ment, exempt in every respect from the jurisdiction of the State, was a political anomaly which was bound to meet later with fierce opposition from the people of Georgia. Moreover, an important decision of the Supreme Court of the United States, in 1823, in *Johnson* v. *McIntosh*, 8 Wheat. 543, had settled the question of the nature of the Indian title to the soil, and had held that the fee to lands in this country vested in the British Government, by discovery, according to the acknowledged law of civilized nations; that it passed to the United States by the Revolution; and that the Indian tribe had a right of occupancy only.[1] This decision confirmed the determination of Georgia to exercise full right of sovereignty over its soil and over those who lived within its borders. Accordingly, in 1824, it formally asserted its complete jurisdiction over the Indians, and declared that the Federal Government lacked the power to bind a State by a treaty made with Indian inhabitants. At the same time, the State asserted its sovereignty over lands within its borders owned by the Creek Indians, and almost came to actual military conflict with the United States, owing to the policy maintained by President Adams in upholding treaties with that tribe.[2]

[1] This case involved an immense tract of land in Illinois (upwards of 50,000,000 acres between the Illinois and Wabash Rivers). It was argued by R. G. Harper and Webster against W. H. Winder and Murray, the former losing the case. . . . Of the decision, the *Washington Republican* said: "The great importance of the subject matter in controversy seems to require rather a more detailed notice than is usual. . . . One of the most luminous and satisfactory opinions, we recollect ever to have listened to." See *Niles Register*, XXIV, March 8, 1823.

[2] See *State Documents on Federal Relations* (1911), by Herman V. Ames. An attempt to enforce a prosecution of Georgia surveyors who had entered the Creek Indian Territory in violation of the Act of Congress of March 30, 1802, "to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontiers", is interestingly referred to by John Quincy Adams in his *Memoirs* (during his Presidency) as follows:

Feb. 9, 1827. Company to dine. The Judges and Bar of the Supreme Court. I spoke to Judge Johnson of this controversy with Georgia, which, I told him, would first be tried by him. He said he would laugh them out of it.

Additional complications also arose through the discovery of gold in the Cherokee lands. A crisis came, in 1828, when the Cherokees held a convention and adopted a Constitution for a permanent government, displaying their intention to remain on their lands. The Legislature of Georgia responded by passing, in 1829, a series of laws of the most cruel and stringent nature, invalidating all laws and ordinances adopted by the Indians, and providing for a division of their lands. As these laws were clearly in violation of the treaty with the United States, Congress was forced now to take cognizance of the situation, but its action was feeble; and the new President, Andrew Jackson, was in entire sympathy with the State of Georgia in its claim of right to legislate over all persons within its territory, regardless of the Federal treaty. To an application made by the Cherokees for protection by Federal troops against the efforts made by Georgia to remove the Indians by force, Jackson replied "that the President of the United States has no power to protect them against the laws of Georgia." The Cherokees, after obtaining a favorable legal opinion from Ex-Chancellor James Kent, retained John Sergeant of Philadelphia and William Wirt, ex-Attorney-General of the United States, as counsel to bring a case in the United States Supreme Court to test their rights as a sovereign Nation.[1] To

March 10, 1827. When Judge Johnson last dined with me, he promised to look into the Act of Congress . . . upon which the prosecution of the Georgia surveyors within the Indian Territory has been directed. The Judge now suggested that there might be a constitutional difficulty in the execution of the law. . . . The Judge appeared very desirous of being relieved from trying the cause, and said there could be no possible reliance upon a Georgia jury to try it. But he said he should take occasion as soon as possible to send it for trial to the Supreme Court, and he said he had decided many years ago the principle that Indian territory was not within the civil jurisdiction of the United States.

[1] This opinion was concurred in by Daniel Webster, Ambrose Spencer (formerly Chief Justice of New York), Horace Binney and other leaders of the Bar. It must be admitted, however, that the Cherokee Nation did not display great tact or any disposition to conciliate the President in their choice of counsel, inasmuch as both

a suggestion made by Wirt that the State should join in this test case, the Governor of Georgia answered by an indignant and sarcastic letter of refusal, in which he claimed the absolute immunity of the State from any suit in the Federal Courts and its right to decline obedience to any Federal mandate. The leading newspaper of Georgia voiced public sentiment in that State by an editorial saying: "Has it come to this that a sovereign and independent State is to be insulted, by being asked to become a party before the Supreme Court, with a few savages residing on her own territory!!! Unparalleled impudence!" On the other hand, the view of those who denied Georgia's assertion of a nullifying power was expressed by *Niles Register*. "The people are not ripe for such a state of things — and until they are, the authority of the Supreme Court will be supported. . . . Without some high and common arbiter for the settlement of disputes of this character, the Union is not worth one cent. . . . There must needs be some tribunal of a last resort; something which the common sense of all men, for self-preservation, shall accept, not as infallible, but as the nearest possible approach to perfection." [1]

The form of action decided upon was an original bill in equity, to be filed in the Supreme Court by the Cherokee Nation as an independent state, against the State of Georgia, seeking an injunction to restrain it from executing the laws claimed to be illegal and unconstitutional. Before this suit was begun, however, another case arose in the State of Georgia which pre-

men were bitter political opponents of the President, — Wirt as Attorney-General under Jackson's predecessor, and also as a rival for the Presidency — Sergeant as chief counsel for the Bank of the United States, Jackson's *bête-noire*. That Wirt appreciated his situation was shown in an eloquent and honorable letter to James Madison, Oct. 5, 1830; see letter of Wirt to Judge Dabney Carr of Virginia, June 21, 1830. *Wirt*, II, 253, 261.

[1] See *Niles Register*, XXXIX, Sept. 18, 1830

sented the same issues. A Cherokee named Corn Tassel had murdered another Indian within the territory occupied by the tribe. He was arrested by the State authorities under one of the recent State laws, tried and sentenced to be hanged. Application was at once made to the United States Supreme Court for a writ of error to the State trial court, on the ground of the illegality of the State laws. The writ, which was issued on December 22, was treated by the Governor of Georgia, Gilmer, with utter disdain. He transmitted it to the Legislature, then sitting, with a message in which he referred to the subpoena as "a copy of a communication, received this day, purporting to be signed by the Chief Justice of the United States and to be a citation of the State of Georgia to appear before the Supreme Court, on the second Monday in January next, to answer to that tribunal for having caused a person who had committed murder within the limits of the State to be tried and convicted therefor." And he declared that any attempt to execute the writ would be resisted with all the force at his command, saying: "If the judicial power, thus attempted to be exercised by the Courts of the United States, is submitted to or sustained, it must eventuate in the utter annihilation of the State Governments or in other consequences not less fatal to the peace and prosperity of our present highly favored country." [1] The Legislature responded with a violent resolution bitterly denouncing the action of the Supreme Court; and it "requested and enjoined the Governor and every officer of the State to disregard any and every mandate and process

[1] *Niles Register*, XXXIX, Oct. 2, 1830, Jan. 8, 15, 1831. The name of the party suing out the writ in this case, is given in 5 Peters 1, 12, as "Corn Tassel", and I have used the name in this form. In the Resolutions of the Georgia Legislature of Dec. 22, 1830, and as given by some historians, the name appears as "George Tassels." See speech of Everett, Feb. 14, 1831, *21st Cong., 2d Sess.*

that should be served upon them." Two days later, on December 24, 1830, Tassel was executed. This absolute disregard of the process of the Court (characterized mildly by Judge Story as "intemperate and indecorous") was, in fact, practical Nullification. "It is idle to pretend to wink this question out of sight. The integrity and permanence of the Union are at stake," said a Boston Whig newspaper.[1] "If we continue in a false security, we shall find too late that the sheet-anchor of our National being is lost forever." And another paper said very truly that: "The plain question which the rashness of these intemperate politicians has forced on the country is whether the judicial arm of the General Government shall be amputated, or armed with additional vigor, and whether by the mere volition of one of the States of the Union, the structure of our government shall be at once and violently overthrown." To these views, on the other hand, the Administration paper in Washington, the *United States Telegraph*, replied editorially, that "the position in which the Supreme Court is placed by the proceedings of Georgia demonstrates the absurdity of the doctrine which contends that the Court is clothed with supreme and absolute control over the States." To the Whig paper, the *National Intelligencer*, which deplored the "awful consequences" of aiding Georgia, and the "extraordinary circumstance of the present conjuncture, that the Official Gazettes are engaged in a combination to weaken the Supreme Court of the United States in the confidence and esteem of the People", the *Telegraph* retorted by referring to "affected hysteria" and said: "No one is more desirous than we are to preserve for the Supreme Court that veneration and confidence upon which its

[1] *Boston Courier*, Jan. 21, 1831; *National Journal*, Jan. 4, 1831.

usefulness, if not its existence, depends; and for that purpose we would guard against all political collisions with public sentiment. A difference of opinion as to the extent of the powers vested in that Court has existed since its organization. . . . All who desire to perpetuate our institutions and look to our Courts as the arbiters of justice must regret the attempt to identify them with political aspirants." [1] Violent remarks in other Northern papers to the effect that resistance to the Court by Georgia might be treason, that the Supreme Court was not to be intimidated, and that President Jackson must enforce the laws, brought forth the countercharge that: "There is a determination on the part of some of the political managers to bring the Supreme Court in collision with the Executive of the Union as well as with the States . . . a determination to enlist the influence of the Court and the spirit of the Judiciary and Bar in opposition to the Administration. . . . Why else is it said that the Court will not be *intimidated?* Is it that the pride of the Court may be roused under the pretense of vindicating its authority? Every friend of the Court must condemn the effort to enlist it as a party to an angry political contest. The friends of Andrew Jackson know that *he* is not to be *intimidated.*" The *Richmond Enquirer*,

[1] *United States Telegraph*, Jan. 3, 7, 1831; *National Intelligencer*, Jan. 4, 7, 8, 1831. The *National Journal*, Jan. 4, said: "The people should have a watchful eye to the course which Gen. Jackson may pursue in this very extraordinary crisis of our affairs;" on Jan. 6, it said: "The Union is in danger. Gen. Jackson must sustain the Court process"; on Jan. 10, after noting the editorials in the *Telegraph* it said: "After this language sanctioned, perhaps suggested by the Administration, what hope is there of any action on the part of the President of the United States to sustain the Supreme Court in the execution of the laws?" The *New York Commercial Advertiser*, Jan. 12, said: "The authority of the Supreme Court is contemned, the Constitution of the United States is trampled in the dust, and all this Gen. Jackson will pronounce to be right." The *New York Daily Advertiser*, Jan. 4, 6, 1831, said that it would be interesting to see what course the President would take. "In case of resistance to the authority of the judicial tribunals and the process of the law, he must enforce obedience to the law at all hazards. A refusal will render him liable to impeachment."

noting that the Georgia and South Carolina papers had expressed their "astonishment and resentment" at the issuing of a summons to the State of Georgia, stated that Georgia "is being dragged to the bar" as Virginia was in the *Cohens Case;* and that in cases like this, the two Governments, — the Federal and the State — "ought to bear and forbear." [1]

The position taken by the State of Georgia and its adherents was further indorsed by the determined effort which was being made in Congress, early in 1831, to repeal the much feared Twenty-Fifth Section. Before Congress met in December, 1830, it had become known that such an attack on the Court's appellate jurisdiction was impending. The *National Intelligencer* warned "the friends of the Union to awake from their dreamy indolence. . . . Repeal the vital part of the Judiciary Act and we would not give a fig for the Constitution. It will have become a dead letter." "There is obviously a determination, on the part of the politicians of a certain school, to curtail the constitutional jurisdiction and destroy the influence and independence of the Supreme Court of the United States," said a leading Whig paper in New York.[2] "This disposition has existed in the minds of some persons from the early history of the Government, but it has more recently become the policy not only of individual politicians, but of large numbers, and even of majorities in some of

[1] *United States Telegraph,* Jan. 8, 10, 26, 1831. See also *Washington Globe,* Jan. 5, 1831: "But it seems now there is to be a crusade carried on against the South by the party of whom the Chief Justice has been always the uniform representative. He has achieved for them infinitely more in the Court than all the rest of the party have been able to effect elsewhere." The *New York Daily Advertiser,* Jan. 10, 1831, quoted a correspondent of the *Charleston Mercury* applauding Georgia, and rejoicing that the "high-handed, and now at least palpable, usurpations" of the Federal power "have been bravely met." The *National Intelligencer,* Jan. 11, 12, 15, 1831, quoted the *New York Courier* and *Southern Times* (Columbia, S. C.) as approving Georgia's course.

[2] *New York Daily Advertiser,* Jan. 13, 1831.

the States; and there now appears to be a regular organized system of measures and operations calculated to produce the result so long and so eagerly desired and sought after. At the present period of the world, no intelligent and honest man will call in question the necessity of the absolute independence of Courts of popular sentiment and party clamour. . . . Every attempt, therefore, to destroy their independence, from whatever source it proceeds, is a direct effort to violate the spirit of the Constitution in one of its vital principles. One mode of producing this effect is to impair the influence and reputation of the Court by calumny and slander, representing it as greedy of power, desirous of extending its jurisdiction, and, in the end, of consolidating the National Government by taking away the legitimate powers of the State governments, and rendering them mere cyphers in the construction of the confederation. . . . Accusations of this sort are calculated for effect. The object is to alarm the fears and excite the jealousies of the States. They are, however, wholly without foundation." All this outcry, it was urged, came from interested sources — the opposition of the Southern States to the tariff policy of the Government, the "licentious desires" to obtain Indian territory, the refusal of Georgia to allow Federal interference in her treatment of the Indians and to submit the validity of her acts "to this learned, able, upright and respectable tribunal." That the people of the country would "stand carelessly by and see this great branch of their government trampled under foot by interested, ambitious and unprincipled politicians", the New York paper said, was not to be believed. "When the Supreme Court are stripped of their constitutional powers and prerogatives, the government itself will be undermined, and its destruction

cannot be avoided. . . . Once deprive the Court of the power of determining constitutional questions, and the Legislatures of the States will be let loose from all control, and as interest or passion may influence them, will reduce the National Government to a state of dependence and decrepitude, which would be more characteristic of the authority of a feeble colony than that of a large, powerful, independent nation. . . . If the people do not manifest a determination to support the Judiciary, they may make up their minds to part with the Government." [1]

Shortly after Congress convened, the House of Representatives instructed its Judiciary Committee to inquire into the expediency of a bill to repeal this Section; and it was under such "very peculiar and trying circumstances" that the Court assembled for its January, 1831, Term. "The Court has met, with a knowledge that it will be violently assailed in the House of Representatives, and that an attempt will be made to deprive it of its constitutional right to decide on the constitutionality of State laws," said a New York Whig paper. "A bill to that effect will be reported in a few days. If it shall become a law, the Government will be at an end. There is no law of the United States that may not be rendered wholly inoperative by any one of the States. The Supreme Court has been justly considered as the sheet-anchor of the Constitution; and while every other department of the Government has been contaminated within less than two years, our hopes have been placed on this anchor. . . . The appointment of Judges McLean and Baldwin by the present Administration was wholly fortuitous and produced by a combination of political causes beyond the control of the President. If their seats were now va-

[1] *New York Daily Advertiser*, Jan. 13, 14, 15, 1831.

cant, there is no doubt they would be filled with thorough-going nullifiers." On January 24, 1831, a repeal bill was reported favorably by a majority of the Judiciary Committee by Warren R. Davis of South Carolina.[1] A minority report, however, was made at the same time, which must be regarded as one of the great and signal documents in the history of American constitutional law. It was drafted by James Buchanan of Pennsylvania, and signed also by William W. Ellsworth of Connecticut (son of Chief Justice Ellsworth) and Edward D. White of Louisiana (father of Chief Justice White).[2] Though Thomas F. Foster of Georgia, one of the signers of the majority report, stated that the passage of the bill was necessary, since the powers of the Court were so "vast and alarming that the constantly increasing evil of interference of Federal with State authorities must be checked", the measure was, in fact, an offspring of the doctrine of Nullification then prevalent in the South. Such a connection between the two was admitted by John C. Calhoun, who, in writing that he thought the report would pass the House, said: "However strange it may seem, there are many who are violently opposed to what they call Nullification. The discussion of the report will doubtless strengthen our doctrines." [3]

[1] The *Boston Courier* said, Feb. 1, 1831: "The bill will be supported by the ultra-exclusive friends of State-Rights and probably meets the views of the Executive and the Cabinet, so that the country is in the singular position of being ruled by an Administration, opposed to the powers of the Federal Government and which recommends and adopts every measure calculated to break up the Union." How false a statement of Jackson's position this was, his course, two years later in the Nullification movement, showed conclusively. See also *National Journal*, Feb. 17, 1831.

[2] *21st Cong., 2d Sess.*, Jan. 24, 25, 29, 1831; see *House Report No. 43;* see also *Works of James Buchanan* (1908), II, 56–80; *22d Cong., 2d Sess.*, debate in the Senate on the Force Bill, speeches of Frelinghuysen of New Jersey, Feb. 3, 1833, Holmes of Maine, Feb. 5, 1833, in defense of the 25th Section of the Judiciary Act.

[3] *21st Cong., 2d Sess.*, Feb. 17, 1831; *Letters of J. C. Calhoun, Amer. Hist. Ass. Report* (1899), II; see *22d Cong., 1st Sess.*, June 11, 1832, speech of Foster of Georgia. In view of President Jackson's determined opposition to Nullification

Another great statesman, James Madison, saw equally clearly at this time that to deprive the Court of its power to construe the Constitution and to place this power in the hands of the separate States were correlative propositions, and he wrote: "The jurisdiction claimed for the Federal Judiciary is truly the only defensive armor of the Federal Government, or rather for the Constitution and laws of the United States. Strip it of that armor, and the door is wide open for nullification, anarchy and convulsion, unless twenty-four States, independent of the whole and of each other, should exhibit the miracle of a voluntary and unanimous performance of every injunction of the parchment compact." [1] And Judge Story wrote to George Ticknor of Boston: "If the Twenty-Fifth Section is repealed, the Constitution is practically gone. It is an extraordinary state of things, when the Government of the country is laboring to tread down the power on which its very existence depends. You may depend that many of our wisest friends look with great gloom to the future. Pray read, on the subject of the Twenty-Fifth Section, the opinion of the Supreme Court, in *Hunter* v. *Martin*, 1 *Wheaton's Reports*, it contains a full survey of the judicial powers of the General Government, and Chief Justice Marshall concurred in every word of it." Writing more fully, six days later, Story termed the bill: "A most important and alarming measure. . . . If it should prevail (of which I have not any expectation) it would deprive the Supreme Court of the power to revise the decisions of the State Courts and State Legislatures, in all cases in which they were repugnant to the Con-

it is interesting to note that Daniel of Kentucky, speaking in the House on the Force Bill, Feb. 28, 1833, said: "It was well known in the House that the President was in favor of the repeal of the 25th Section, — this, you yourself well know" (addressing Polk of Tennessee who was then in the Chair). *22d Cong., 2d Sess.*

[1] *Madison*, IV, 296, letter to Joseph C. Cabell, April 1, 1833.

stitution of the United States. So that all laws passed and all decisions made, however destructive to the National Government, would be utterly without redress . . . the measure would enervate the whole power of the United States. I have said that it will not probably succeed; indeed, the expectation is that it will fail by a very large vote; but the introduction of it shows the spirit of the times." [1] This prediction of the defeat of the bill was accurate; for on a motion to order to second reading it was rejected on January 29, practically without debate, and by a vote of 158 to 51, all but six of the minority votes coming from Southern and Western States.[2] "The House by a vote of more than 2 to 1 have rejected a bill the tendency of which was to shake our institutions to their very foundation," said the *United States Gazette.* "The audacious attempt of a few hot-headed demagogues to break up the Supreme Court has been foiled," said a Boston Whig paper,[3] and its Washington correspondent wrote that the reason for disposing of the bill by a motion to lay on the table was "the very solid one that the subject is one which it is sacrilegious to touch and which will be defiled by the rude handling of partisan soldiers. . . . Mr. Doddridge said in debate that he considered himself voting on the question whether the Union should be preserved or not, and though the language is strong, yet the declaration is correct and in common use." "This is a momentary respite for the

[1] *Story*, II, 48, 43, letters of Jan. 22, 28, 1831.

[2] See editorial in *National Intelligencer*, Jan. 31, 1831.

[3] *Boston Courier*, Feb. 1, 5, 1801. The Washington correspondent of the *United States Gazette*, wrote Jan. 29, 1831: "I understand that a great many of the friends of the Judiciary are very much disconcerted with this motion for the previous question, as they were very desirous that the subject should be fully discussed, in order that the advocates and enemies of the Judiciary might have an opportunity to measure their strength. Many on the other side, equally confident, were desirous to bring on a debate; whether good or harm would have resulted from a fuller discussion of so delicate a matter it is bootless now to inquire."

Judiciary of the Union," wrote John Quincy Adams in his diary, "and to the Union itself, both of which are in imminent danger. . . . I had a short visit from Judge Thompson of the Supreme Court. He is alarmed for the fate of the Judiciary . . . and thinks, as I do, that the leading system of the present Administration is to resolve the Government of the Union into the National imbecility of the old Confederation." "We rejoice here (in Massachusetts) most heartily at the rejection by so large a majority," wrote one of Webster's correspondents. "That such a proposition ever could be made is, however, ominous of a bad spirit. The times are critical." [1]

The adherents to the bill were not discouraged by the vote, but showed the violence of their feelings in a subsequent heated debate, which took place over the motion to print 600 copies of the Report of the Judiciary Committee for wide public distribution. "The strides of Federal usurpation begin to alarm the most indolent. The spirit of indignation has already gone abroad in the land, and the people are now seeking a remedy for the evil. It cannot be stifled nor subdued," said Henry Daniel of Kentucky. "The exercise of power by virtue of the 25th Section strikes directly at the root of State sovereignty and levels it with the dust. . . . In some instances, the Federal Government, the harmony of the country, has been shaken to its very centre by these collisions. Nearly every State in the Union has had its sovereignty prostrated, has been brought to bend beneath the feet of the Federal tribunal. It is time that the States should prepare for the worst, and protect themselves against the assaults of this gigantic tribunal." And William F.

[1] *J. Q. Adams*, VIII, Jan. 29, 30, 1831; *Van Tyne Copies of Webster Papers*, in Library of Congress, letter of Stephen White to Daniel Webster, Feb. 5, 1831.

Gordon of Virginia urged that the repeal of the Section, more than anything else, would tend "to compose the present agitation of this country and allay the prevailing excitement." On the other hand, Philip Doddridge of Virginia said that he considered the proposition to repeal, "as equivalent to a motion to dissolve the Union." [1]

Though defeated on the question of repeal, another form of attack was at once devised by the extreme State-Rights men, and a resolution was introduced in the House, in 1831, by Joseph Lecompte of Kentucky, calling on the Judiciary Committee to inquire into the expediency of amending the Constitution so as to limit the term of office of Federal Judges. This resolution, however, was also lost by a vote of 115 to 61.[2]

Nevertheless, in spite of these defeats of Congressional measures to change the Judiciary system, the situation was extremely serious; and Judge Story wrote with much reason: "I have for a long time known that the present rulers and their friends were hostile to the Judiciary, and have been expecting some more decisive demonstrations than had yet been given out. The recent attacks in Georgia and the recent Nullification doctrine in South Carolina are but parts of the same general scheme, the object of which is to elevate an exclusive State sovereignty upon the ruins of the General Government. . . . The opinions upon this subject have been yearly gathering strength, and the

[1] *21st Cong., 2d Sess.*, Feb. 7, 9, 17, 25, 1831.

[2] *21st Cong., 2d Sess.*, Jan. 28, 1831. A similar resolution for a Constitutional Amendment was offered by Lecompte, Jan. 30, 1832, and was defeated by a vote of 144 to 27, *22d Cong., 1st Sess.* A similar resolution offered by Thomas L. Hamer of Ohio, Jan. 7, 1835, was defeated by a vote of 84 to 90, *23d Cong., 2d Sess.* See also similar resolutions offered by Benjamin Tappan of Ohio, in 1839, 1840, 1842 and 1844, all of which were defeated. See *Proposed Amendments to the Constitution*, by Herman V. Ames, *Amer. Hist. Ass. Rep.* (1896), II. See also *J. Q. Adams*, IX, 197; and *Niles Register*, Feb. 24, 1831, as to resolution of the Pennsylvania House of Representatives, upholding the 25th Section.

non-resistance and passive obedience to them exhibited by the rest of the Union, have encouraged, and indeed nourished them. If, when first uttered, they had been met by a decided opposition from the Legislatures of other States, they would have been obsolete before now. But the indifference of some, the indolence of others, and the easy good-natured credulity of others, have given a strength to these doctrines, and familiarized them to the people so much, that it will not hereafter be easy to put them down." [1]

That the Chief Justice and his Associates on the Court, however, were not in any way intimidated by these attacks, or to be deterred from following the path of official duty, by any fear of legislation diminishing their jurisdiction, was seen by a decision made very soon after the Court assembled for its 1831 Term.[2] In *Fisher* v. *Cockerell*, 5 Pet. 248, in which the occupying claimant laws of Kentucky were again before the Court, Marshall, in dismissing the case on a procedural point, referred to the hostile attitude of the States and of Congress as follows:

> In the argument, we have been admonished of the jealousy with which the States of the Union view the revising power intrusted by the Constitution and laws of the United States to this tribunal. To observations of this character, the answer uniformly given has been that the course of the Judicial Department is marked out by law. We must tread the direct and narrow path prescribed for us. As this Court has never grasped at ungranted jurisdiction, so will it never, we trust, shrink from the exercise of that which is conferred upon it.

[1] *Story*, II, 47, letter of Jan. 30, 1831.

[2] The Washington correspondent of the *Boston Courier*, Feb. 2, 1831: "The Supreme Court, during the repeated attempts to ascertain whether it would exist after losing the principle of life, has gone on with its business in an almost forgotten corner of the Capitol, with its usual dignity. Notwithstanding the necessity of passing over all the cases in which Members of Congress were engaged as counsel, the Court has disposed of an extraordinary number of cases."

Such was the situation when the bill had been filed by the Cherokee Nation in the Court for an injunction "to restrain the State of Georgia, the Governor, Attorney General, Judges, justices of the peace, sheriffs, deputy sheriffs, constables and others, the officers, agents and servants of that State, from executing and enforcing the laws of Georgia, or any of these laws, or serving process, or doing anything towards the execution or enforcement of those laws within the Cherokee territory, as designated by treaty between the United States and the Cherokee Nation." [1] A subpoena was served on the Governor of Georgia in this suit on December 27, 1830, just three days after the execution of Tassel and five days after the nullifying resolution of the Legislature. The Governor, in accordance with the Legislative instruction, and recognizing "no authoritative arbiter between the State and its Cherokee inhabitants" paid absolutely no attention to the subpoena.[2] No appearance was entered for the State in the Supreme Court at Washington, and the State preserved officially an "ominous and sullen silence"; although unofficially it was freely stated that, in case of an adverse decision by the Court, the State would refuse to abide by any of its mandates. Whig papers at the North furthermore asserted that "the President has very recently and vehemently declared that he would not lend any assistance to support the authority of the Court, in case Georgia should be, as no doubt she

[1] See *The Cherokee Nation* v. *The State of Georgia*, 5 Pet. 1. On March 12, 1831, a supplemental bill in equity was filed by the Cherokee Nation in the Supreme Court, describing the proceedings in the *Tassel Case*, the deliberate violation of the mandate of the Court, and the adverse legislation of December, 1830, in Georgia.

[2] The sympathy of other States holding extreme views of State-Rights and of the interference of the Supreme Court with such rights was shown at this time by a resolution offered in the House of Delegates of Maryland for an Amendment of the National Constitution, so as to provide for the decision of all cases in which the constitutionality of a State law should be brought in question, by a two thirds vote of the United States Senate. See *Niles Register*, XXXIX, Jan. 15, 1831.

will, in contempt." Though no official or authentic statement by Jackson could be cited to this effect, and though his supporters stated that the charge was merely designed by his party foes to rouse a prejudice against him, there was sufficient likelihood of its truth to make the Court extremely reluctant to have the issue raised between it and the Executive and the State of Georgia. "The affair of Georgia, so far as Tassels is concerned has probably passed by with his death," wrote Story on January 22. "But we are threatened with the general question in another form. At this moment, it would have been desirable to have escaped it, but, you know, it is not for Judges to choose times and occasions. We must do our duty as we may." [1]

On March 5, 1831, Mr. Sergeant moved the Court for an injunction. The argument was interrupted, March 7–11, to allow another of Wirt's cases to be argued (*Charles River Bridge* v. *Warren Bridge*). It was renewed by Sergeant on March 12, in "a very able and profoundly legal argument", and by Wirt, who delivered "one of the most splendid discourses ever pronounced in the Court, and as powerful in argument, as it was beautiful in diction", the peroration being described by newspaper correspondents as "sublime indeed", "of deep feeling and pathos." [2]

[1] *Boston Courier*, Feb. 16, 1831; *National Journal*, March 17, 1831; the Washington correspondent of the *New York Daily Advertiser* wrote in its issue of Jan. 15, 1831: "The Court has assembled under a very peculiar and trying circumstance. Heretofore it has met with the certainty that its orders, judgments and decrees would be carried into effect by the Executive branch of the Government, however much they might conflict with the interests, prejudices, or prepossessions of the parties or of the States. It has now met with a full knowledge that the Executive will not enforce its decisions, if they are counter to his views of constitutional law." *Story*, II, 48, letter of Jan. 22, 1831.

[2] *National Intelligencer*, March 7, 14, 16, 18, 1831; *Niles Register*, March 26, 1831, quoting *New York Journal of Commerce;* the *National Journal*, March 15, 1832, said: "The Court was considerably crowded throughout the day; some of the Cherokee delegation were present, one of whom of very respectable and intelligent appearance, shed tears copiously." See *Story*, II, 51, letter of March 10, 1831.

A picturesque account was given by John Quincy Adams in his diary:

March 12, 1831: I walked to the Capitol and heard J. Sergeant for about three hours, before the Supreme Court, upon the injunction prayed by the Cherokee Nation. . . . Sergeant and Wirt are now arguing the question of jurisdiction without any counsel to oppose them; but the weight of the State will be too heavy for them. The old vice of confederacies is pressing upon us — anarchy in the members. . . . Mr. Sergeant's argument made it necessary for him to maintain that the Cherokee Nation are a foreign State, and this is the very point upon which the judgment of the Court may be against them. The argument was cold and dry. . . . There were however several ladies among the auditory who sat and heard him with exemplary patience.

March 14: Walked to the Capitol again to hear the conclusion of the argument on behalf of the Cherokee Indians by Mr. Wirt. . . . His health is much broken down, but his voice is strong and his manner animated beyond the condition of his strength. After finishing the argument upon the constitutional points and chiefly on the jurisdiction of the Court he concluded by a short appeal to the sympathies of the case in a low tone of voice and that accent of sensibility which becomes doubly impressive by being half subdued. The deep attention of the auditory was the indelible proof of its power. His argument was little more than a repetition of what has been said by Sergeant. His pathos was his own.

The closing words of Wirt's oration are particularly significant, in showing the grave fears that were popularly felt lest Georgia might continue to set the Supreme Court at defiance:[1]

Shall we be asked (the question has been asked elsewhere) how this Court will enforce its injunction, in case it shall be awarded? I answer, it will be time enough to meet that question when it shall arise. At present, the question is

[1] *Wirt*, II, 336–341.

whether the Court, by its constitution, possesses the jurisdiction to which we appeal. . . . In a land of laws, the presumption is that the decision of Courts will be respected; and, in case they should not, it is a poor government indeed in which there does not exist power to enforce respect.

What is the value of that government in which the decrees of its Courts can be mocked at and defied with impunity? Of that government did I say? It is no government at all, or at best a flimsy web of form, capable of holding only the feeblest insects, while the more powerful of wing break through at pleasure. If a strong State in this Union assert a claim against a weak one, which the latter denies, where is the arbiter between them? Our Constitution says that this Court shall be the arbiter. But, if the strong State refuses to submit to your arbitrament, — what then? Are you to consider whether you can of yourselves, and, by the mere power inherent in the Court, enforce your jurisdiction, before you will exercise it? Will you decline a jurisdiction clearly committed to you by the Constitution, from the fear that you cannot, by your own powers, give it effect, and thus test the extent of your jurisdiction, not by the Constitution, but by your own physical capacity to enforce it? . . .

But, if we have a government at all, there is no difficulty in either case. In pronouncing your decree you will have declared the law; and it is part of the sworn duty of the President of the United States to "take care that the laws be faithfully executed.". . . If he refuses to perform this duty, the Constitution has provided a remedy. But is this Court to anticipate that the President will not do his duty, and to decline a given jurisdiction in that anticipation. . . . Unless the Government be false to the trust which the people have confided to it, your authority will be sustained. I believe that if the injunction shall be awarded, there is a moral force in the public sentiment of the American community, which will, alone sustain it and constrain obedience.

On the last day of the Term, March 18, and only four days after the close of the argument, Chief Justice Marshall, after saying that "if Courts were permitted

to indulge their sympathies, a case better calculated to excite them can scarcely be imagined", held that the Cherokee Nation was not a foreign nation and that the Court had no original jurisdiction of the cause. "If it be true," he said in closing, "that wrongs have been inflicted and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future." [1]

The decision of the Court was greeted with a singular and contradictory variety of opinion. Van Buren (probably representing Jackson's view) considered that Marshall's *dictum* at the end of his opinion stating that "the mere question of right to their lands might perhaps be decided by the Court in a proper case with proper parties" was a deliberate "design to operate upon the public mind adversely to Georgia and the President", and to affect the political situation.[2] Georgia, the Nullifiers and the extreme State-Rights papers were elated at the decision, and sought to give to the public the impression that the Court had decided in favor of Georgia's contentions and had given "sanction to the pretensions and conduct of that State with regard to the Indians." [3] The extreme Whigs of the North were correspondingly disconcerted. "The nullifying politicians of Georgia," said a Boston paper, "must be not a little astonished to find themselves accidentally on the side of the Union and receiving aid from its highest legal tribunal, when they have been laboring so hard to convince their constituents that they were traduced, abused

[1] The *National Intelligencer*, March 28, 1831, noted with regret the publication in the *New York Journal of Commerce* the fact that Story and Thompson dissented. "This fact, if true, made the decision that of a bare majority of the Court, as Duval was absent."

[2] *Autobiography of Martin Van Buren, Amer. Hist. Ass. Rep.* (1918), II, 291.

[3] *Richmond Enquirer*, March 22, 1831; see protests of *National Gazette* at this misrepresentation, March 22, 24, 26, 1831.

and oppressed by the Federal Government." [1] While it was greatly to the honor of a tribunal, which had been so often taxed with a spirit of usurpation, that it should have refused to decide the merits of the case on which it held very clear views, its refusal to do so, on the ground that it had no jurisdiction, subjected it now to severe criticism by those who had hitherto been its ardent supporters; for in the North and the East the treatment of the Cherokees was felt to be a moral issue almost equal to the slavery question. "It is certainly much to be regretted," said the *North American Review*, "that a case of this importance should have been decided, on any other principle than that of doing substantial justice between the parties." And Judge Story himself vehemently wrote to a friend: "The subject touches the moral sense of all New England. It comes home to the religious feelings of our people; it moves their sensibilities, and strikes to the very bottom of their sense of justice. Depend on it, there is a depth of degradation in our National conduct, which will irresistibly lead to better things. There will be, in God's Providence, a retribution for unholy deeds, first or last." [2] On the other hand, the *American Jurist* said in defense of the Chief Justice that: "Aspersed by a great statesman (now no more) as amplifying jurisdiction, this case shows he cannot do it, even to amplify justice; and together with

[1] *Boston Courier*, March 25, 1831.

[2] See *North Amer. Rev.*, XXXIII, 136; see also *Review of the Cherokee Case*, by Joseph Hopkinson, *Amer. Quar. Rev.*, X (March, 1832), *Story*, II, 46, letter of June 24, 1831, to Richard Peters. Writing to his wife, Jan. 13, 1832, Judge Story said: "At Philadelphia, I was introduced to two of the Chiefs of the Cherokee Nation so sadly dealt with by the State of Georgia. They are both educated men, and conversed with singular force and propriety of language upon their own case, the law of which they perfectly understood and reasoned upon. I never in my whole life was more affected by the consideration that they and all their race are destined to destruction. And I feel, as an American, disgraced by our gross violation of the public faith towards them. I fear, and greatly fear, that in the course of Providence, there will be dealt to us a heavy retributive justice." *Ibid.*, 79.

Burr's trials, the steamboat case, and the case of Marbury and Madison, abundantly evinces how, with equal solicitude and firmness, he can exercise whatever jurisdiction the Court has and renounce whatever of jurisdiction it has not." [1]

Since it was evident that this Cherokee question was not definitely settled and that it was likely to involve the Judiciary in a further struggle, Chief Justice Marshall, whose health had been feeble for some time and who was now in his seventy-fifth year, seriously considered resigning his office.[2] But in response to many protests, he finally decided to postpone such a step, although he wrote to Judge Story: "I am most earnestly attached to the character of the department, and to the wishes and convenience of those with whom it has been my pride and my happiness to be associated for so many years. I cannot be insensible to the gloom which lours over us. I have a repugnance to abandoning you under such circumstances which is almost invincible. But the solemn convictions of my judgment, sustained by some pride of character, admonish me not to hazard the disgrace of continuing in office a mere inefficient pageant." The feeling of the country in general, at the mere rumor of Marshall's resignation, had been voiced by a New York Whig paper,[3] which stated that it would be considered "as one of the greatest National calamities that could at this time befall the United States. In our estimation, he is, beyond question, the most important public character of which the Union can now boast. Probably much more that is interesting to the welfare of the country may depend upon the continuance of his

[1] *American Jurist* (Oct., 1831), VI.

[2] See letters to Judge Story, June 26, Oct. 12, 1831. *Mass. Hist. Soc. Proc., 2d Sess.*, XIV.

[3] *New York Daily Advertiser*, March 28, 1831.

judicial life for some time to come, than upon that of any other individual in existence. The loose and heterodox sentiments, openly professed by men occupying important stations in the General Government, and, among them, by him who holds the highest office under that Government, renders it a dangerous thing to vacate so immensely important an office as that of Chief Justice. The safety of the very Union might be hazarded by the appointment of a successor. . . . The mischief which a nullifying Chief Justice might introduce into the execution of the laws and the administration of justice would be boundless and in the highest degree fatal to the peace and safety of the Union." [1] The Whig fear so expressed as to the character of Marshall's possible successor was made clear in a characteristically pungent comment of John Quincy Adams in his diary at this time: "Wirt spoke to me also in deep concern and alarm at the state of Chief Justice Marshall's health. He is seventy-five years of age and has until lately enjoyed fine health, exercised great bodily agility and sustained an immense mass of bodily labor. . . . His mind remains unimpaired, but his body is breaking down. He has been thirty years Chief Justice, and has done more to establish the Constitution of the United States on sound construction than any other man living. The terror is that, if he should be now withdrawn, some shallow-pated wild-cat like Philip P. Barbour, fit for nothing but to tear the Union to rags and tatters, would be appointed in his place. Mr. Wirt's anticipations are gloomy, and I see no reasonable prospect of improvement." [2] As seen in the calm

[1] This editorial closed by saying that it had learned that the rumor as to resignation was untrue, and it stated: "It is not improbable that the story was set on foot with the hope of inducing him by a broad hint to do that which some violent party politicians may be anxious he should do — leave his office to some thoroughgoing nullifier."

[2] *J. Q. Adams*, VIII, Feb. 13, 1831.

light of history, all these fears as to the fate of the Judiciary at Jackson's hands were unwarranted; and Adams's characterization of Barbour was of course unjust, for the latter, when appointed on the Supreme Court in 1836, made an excellent and broad-minded Judge; but they accurately picture the alarm felt by the more conservative of the community over the attacks on the integrity of the Union and on its Judiciary.

This alarm was now enhanced by the even more serious conflict between the Court and the State of Georgia which arose in the following year. Among the statutes passed by the Georgia Legislature, pending the excitement over the first Cherokee case in December, 1830, was one requiring all white persons living within the Cherokee country after March 11, 1831, to obtain a license and to take an oath of allegiance to the State. Two missionaries, Samuel A. Worcester and Elizur Butler, who refused to obtain a license or to leave the country when ordered by the State, were arrested, convicted in the Georgia State Court and sentenced to four years' imprisonment at hard labor. On an appeal to the United States Supreme Court, a writ of error was issued by that Court to the Superior Court of Georgia, October 27, 1831, and was duly served on the Governor and on the Attorney-General. On receipt of the writ, Governor Lumpkin transmitted it to the Georgia Legislature in a message inspired by the same spirit of defiance as the message of Governor Gilmer, the preceding year, and saying that: "Any attempt to infringe the evident right of a State to govern the entire population within its territorial limits, and to punish all offences committed against its laws within those limits (due regard being had to the cases expressly excepted by the Constitution

of the United States) would be the usurpation of a power never granted by the States. Such an attempt, whenever made, will challenge the most determined resistance; and if persevered in, will inevitably eventuate in the annihilation of our beloved Union." [1] And the Legislature, as in the prior case, responded by passing rebellious resolutions, stating that: "Any attempt to reverse the decision of the Superior Court . . . by the Supreme Court of the United States, will be held by this State as an unconstitutional and arbitrary interference in the administration of her criminal laws and will be treated as such. That the State of Georgia will not compromit her dignity as a sovereign State, or so far yield her rights as a member of the Confederacy, as to appear in, answer to, or in any way become a party to any proceedings before the Supreme Court, having for their object a reversal or interference with the decisions of the State Courts in criminal matters." It also directed the Governor to pay no attention to any subpoena or mandate of the Supreme Court and required him, "with all the power and means placed at his command, by the constitution and laws of this State to resist and repel any and every invasion from whatever direction it may come, upon the administration of the criminal laws of this State."

This second *Cherokee Case* was finally argued on February 20, 1832, no counsel appearing for the State of Georgia, but William Wirt and John Sergeant making eloquent pleas for the missionaries. "Sergeant's speech was equally creditable to the soundness of his head and the goodness of his heart," wrote a Washington correspondent. "The belief was, when he had resumed his seat, that he had left little or no ground for Mr. Wirt to occupy. Were I to judge from Mr.

[1] *Niles Register*, XLI, Dec. 24, 31, 1831.

Wirt's speech today, I should say the subject is inexhaustible. He spoke until after three o'clock, and was obliged, from fatigue, to ask the Court to adjourn. So interesting was the subject, so ably did he present it to the Court, that in addition to the number of gentlemen and ladies who attended from curiosity, so many of the Members of the House resorted to the Court-room that an adjournment was moved before two and after several unsuccessful attempts, it was carried before three o'clock. Several Cherokees, delegated by their Nation, were present; and the deep solicitude depicted in their countenances must have moved the sympathy of every one present whose heart was not as hard as adamant." [1] "Both of the speeches were very able and Mr. Wirt's in particular was unusually eloquent, forcible and finished," wrote Judge Story, February 26. "I confess that I blush for my country when I perceive that such legislation, destructive of all faith and honor towards the Indians, is suffered to pass with the silent approbation of the present Government of the United States."

Ten days after the argument, Chief Justice Marshall, on March 3, 1832, rendered the opinion of the Court, holding the Georgia statute unconstitutional, on the ground that the jurisdiction of the Federal Government over the Cherokees was exclusive, and that the State had no power to pass laws affecting them or their territory. The judgment of the Georgia Superior Court convicting the prisoners was reversed, and a

[1] *New York Daily Advertiser*, Feb. 27, 1832. The *National Intelligencer* said Feb. 22, 1832: "The Supreme Court-room has attracted a numerous audience for the last two days. The writ of error in behalf of the missionaries tried and punished under the laws of Georgia, has been under argument, learned and eloquent." John Quincy Adams wrote in his diary, February 21: "This is a cause of deep interest and there were 50 or 60 members of the House who left their seats to hear him (Wirt)." See *Worcester* v. *Georgia*, 6 Pet. 515.

special mandate was ordered to issue to that Court, March 5, ordering their release. The Judges who delivered opinions showed that they were deeply impressed by the gravity of the issue presented to the Court. To the argument that the Supreme Court had no power to review final decisions of the State Courts, Chief Justice Marshall replied: "It is, then, we think, too clear for controversy, that the Act of Congress, by which this Court is constituted, has given it the power and of course imposed upon it the duty, of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the Judicial Department have no discretion in selecting the subjects to be brought before them." [1] The impression created upon the public was described by a newspaper correspondent as follows: [2] "The Chief Justice was an hour and a quarter in delivering the opinion. His voice was feeble, and so anxious were the audience to hear him that the space in the rear of the Justices, and in front of the bench, was crowded with Members of Congress, gentlemen of the Bar and visitors. . . . The original manuscript, in the handwriting of the Chief Justice, should be preserved; and the friends of the Union and of the Constitution will look upon it with veneration, when its author shall be removed from amongst us." And Judge Story wrote to his wife, March 4: "It was a very able opinion, in his best manner. Thanks be to God, the Court can wash their hands clean of the iniquity of oppressing the Indians and disregarding their rights." Writing four days later to George Ticknor, Story expressed the fear which prevailed in the minds of

[1] Judge Story said to his law students, Nov. 18, 1844, that "Judge Marshall was affected to tears by the eloquent peroration of Wirt. He then said 'I have not shed a tear before, since Webster delivered his speech in the Dartmouth College Case. I then did not expect ever to shed another upon such an occasion.'" See *Life of Rutherford Birchard Hayes* (1914), by Charles R. Williams, I.

[2] *New York Daily Advertiser*, March 7, 1832.

many men, lest the judgment of the Court should not be executed: "Georgia is full of anger and violence. What she will do, it is difficult to say. Probably she will resist the execution of our judgment, and if she does, I do not believe the President will interfere unless public opinion among the religious of the Eastern and Western and Middle States should be brought to bear strong upon him. The rumor is, that he has told the Georgians he will do nothing. I, for one, feel quite easy on this subject, be the event what it may. The Court has done its duty. Let the Nation now do theirs. If we have a Government, let its command be obeyed; if we have not, it is as well to know it at once, and to look to consequences." [1] These apprehensions as to the President's attitude were voiced by many newspapers. Jackson's bitterest antagonist, the *New York Daily Advertiser*, stated that: "The President has said within a few days past, that he had as good a right, being a co-ordinate branch of the Government, to order the Supreme Court as the Court have to require him to execute its decisions. . . . If he refuses to exercise the power vested in him to execute the laws, either he must be impeached and removed from office or the Union of the States will be dissolved. . . . Whatever General Jackson and Georgia may do, the great majority of the Union will support the Judiciary." [2] "We will not anticipate contumacy on the part of Georgia; nor, in that event, inertness in the Executive Department of the General Government," said the *National Gazette*. "But if both should prove delinquent, the question will then arise, is the Constitution indeed the supreme law of

[1] *Story*, II, 86, 83. See *22d Cong., 1st Sess.*, March 5, 1832, pp. 2010 *et seq.*

[2] *New York Daily Advertiser*, March 7, 8, 9, 13, 1832; see *New York Commercial Advertiser*, which also advocated impeachment; *National Gazette*, March 14, 1832; *National Intelligencer*, March 12, 1832, quoting *Richmond Whig*.

the land? . . . Was the Supreme Court intended to be an efficient tribunal? Will Congress allow any one of its rightful decisions to be treated as a mere *brutum fulmen?*" "The prevalent opinion here," said the *Richmond Whig*, "seems to be that the President will do his duty and see that the laws be enforced; but from the tone of the Court Journal, we have little expectation of this. If it be asked, ought the judgment of the Court to be carried into execution by arms, we retort and ask what will be the consequence of failing to execute it? Will not the Federal Government be virtually dissolved? Is that, in truth, any longer a Government which is too feeble to execute its laws? We are brought at once to the point — is it better to have recourse to the bayonet to attempt to keep the Union together, or to permit a peaceable withdrawal of its members, or lastly, to hobble on like the old Confederation, each State obeying such laws as she liked and disobeying others?" "Will a final mandate issue from the Supreme Court to deliver the missionaries during the present Term?" wrote a virulent opponent of Jackson, ex-Chief-Justice Ambrose Spencer of New York, to Daniel Webster. "If not, is it not all important to collect and embody proof, if such exists, that General Jackson declares he will not aid in enforcing the judgment and mandate of the Court? It seems to me very important, if he has made the declarations imputed to him; but the proof of them should be spread before the public, in an authentic shape. The effect of fastening upon him such declarations would be incalculably great."[1] "It

[1] *Webster MSS*, letter to Webster, March 14, 1832; Spencer wrote July 28, 1832, as to the necessity of "inviting the whole strength of the State to rid the Nation of the monster now holding the reins of Government"; and on Jan. 11, 1834, he wrote of Jackson's "despotism" and his "unbalanced attempt to concentrate all power in himself." *Clay*, IV, letter of Clay, March 17, 1832.

is rumored," wrote Henry Clay, "that the President has repeatedly said that he will not enforce it, and that he even went so far as to express his hope, to a Georgia member of Congress, that Georgia would support her rights." "Well, John Marshall has made his decision, now let him enforce it," was the President's commentary on the decision according to the recollection of a Massachusetts Congressman.[1] It is a matter of extreme doubt, however, whether Jackson ever uttered these words. He certainly did not, in fact, refuse to aid in enforcing the Court's decision; and the charge so frequently made in modern histories and legal articles that Jackson actually defied the Court's decree is clearly untrue; for the time never arrived when the exercise of Executive power to enforce the law was called for. Moreover, the debate in 1832 as to whether the President, at some time in the future, would or would not perform such limited functions as he possessed in aiding the Court to execute its decrees was largely hypocritical. Much of the criticism of his alleged attitude towards the Court arose, not so much from sympathy for the Judiciary, as from political hatred of Jackson and his financial policies; and it is certain that most of the attacks came from

[1] The first reference to such a remark is in *The American Conflict* (1864), by Horace Greeley, I, 106, as follows: "The attorneys for the missionaries sought to have this judgment enforced but could not. General Jackson was President and would do nothing of the sort. 'Well, John Marshall has made his decision, now let him enforce it,' was his commentary on the matter. (Note: I am indebted for this fact to the late Governor George N. Briggs of Massachusetts who was in Washington as a member of Congress when the decision was rendered.)"

No previous historian appears to have quoted the alleged remark, but it has been given currency by William G. Sumner in his *Life of Andrew Jackson* (1899) and by many later writers. John Spencer Bassett in his *Life of Andrew Jackson* (1910), II, 690–691, says with reference to it, that it is "a popular tradition, first printed, so far as I know, by Horace Greeley. It is not sure that the words were actually uttered, but it is certain, from Jackson's views and temperament, that they might have been spoken." Bassett further expresses his own view that Jackson "could hardly have known his own mind" on the question of whether there was power in the Government to enforce a Court decree in this case, and on this point Bassett cites two unpublished papers from the *Jackson Papers MSS.*

partisans of the Bank of the United States. "It is truly melancholy to see the mad, malignant fury with which certain opposition papers already urge on the President to enforce the decision of the Supreme Court . . . even before it is ascertained whether the State of Georgia will resist or not," said a New York Democratic paper, which reprobated the denunciation of Georgia, and stated that the safety of the Union lay "in forbearance and moderation, not in coercion. . . . We have no apprehension of any insurrectionary movement, and consequently do not believe that it will become necessary for the President to interfere. The President is not the Executive Officer of the Court. . . . Bitter and unrelenting opposition to the Administration may be masked under an affectation of universal philanthropy. . . . The coalition against Jackson and the fanaticism of his opponents is the key to their affected sympathy with the Indians." [1] So too a Baltimore Democratic paper said: "Many of the opponents of General Jackson have illy disguised, while many of them have openly expressed, their delight at the decision of the Court, not impelled by any feeling of humanity towards the Indians or any admiration of even-handed justice, as they have pretended, but in the hope that it might work injury to the popularity of the President, that he might be brought into collision with the Supreme Court." The *United States Telegraph* (a Washington paper formerly pro-Jackson and then pro-Calhoun) warned the Court as to the effect of reports of impeachment of the President: "The bare suspicion that the Supreme Court participate, in any degree, in the contemplation of such a proceeding cannot fail to impair the high character which it has maintained, which is essential to

[1] *New York Courier*, March 20, May 7, 8, 1832.

an acquiescence in its decisions, and to the peace and harmony of society. It becomes every friend of the Court to mark with the most decided disapprobation all attempts to bring its character and influence within the infected sphere of party politics. We should all feel that that tribunal is sanctified to the cause of justice." [1]

As this Georgia controversy had occurred during the extremely passionate political debate in Congress and in the country which had been taking place, from January to June, 1832, over the bill to renew the charter of the Bank of the United States, the influence of partisan prejudice must be considered in testing the accuracy of statements made by the President's opponents, and particularly with reference to his alleged refusal to execute the law as laid down by the Supreme Court. It is probable that a misconception of Jackson's exact attitude towards the Court in the *Cherokee Case* arose from his known views as to Presidential authority, which he later set forth at length in his message to Congress vetoing the Bank charter, July 10, 1832. In this veto, he had replied to the point raised by the advocates of the bill to the effect that the Supreme Court had already decided the Bank's charter to be constitutional. Such a decision "ought not to control the co-ordinate authorities of this Government," said Jackson. "It is as much the duty of the House of Representatives, of the Senate and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the Supreme Judges when it may be brought before them for judicial

[1] *Baltimore Republican*, March 23, 1832; *United States Telegraph*, April 5, 13, 1832; The *Washington Globe* (the Administration Organ) said, March 13, 1832, as to previous articles in the *Telegraph* that "it has at last boldly raised the flag of nullification."

decision. The opinion of the Judges has no more authority over Congress than the opinion of Congress has over the Judges; and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress, or the Executive, when acting in their Legislative capacities, but to have only such influence as the force of their reasoning may deserve." This statement of the President was assailed by his political opponents, as being the assertion of the right of the Executive to refuse to respect and carry into effect the decisions of the Court; and it was undoubtedly on such a basis that the numerous charges were made against Jackson that he intended to disregard the Court's opinion in the *Cherokee Case*.[1] That the President's real meaning and intention was grossly misconceived at that time and in later years is now certain; and in a recently published letter of Roger B. Taney to Van Buren, the true interpretation of the President's doctrine has been made very clear.[2] Jackson never asserted a right to decline to carry out a Court decision, when acting in his Executive capacity. It was when exercising his part of the law-making function of the Nation, and when deciding upon signature or veto of a bill presented to him, that he claimed the privi-

[1] The *National Gazette* said March 10, 1831, referring to the report that President Jackson denied the constitutionality of the laws and treaties as to the Indians: "Such denial is the exercise of an ex-post-facto veto-power, unknown to the Constitution, and, indeed, places the authority of the Executive above all the laws and processes of legislation. Heretofore, it had been supposed that a law . . . was to be universally obeyed as constitutional until the Supreme Court declared it otherwise. . . . This new doctrine or practice of nullification is worse than that of South Carolina." The *National Gazette* of April 7, 1832, said that if the President's view was correct that he had a right to judge for himself of the constitutionality of laws and treaties "then with him, no branch of the government can be deemed co-ordinate in fact; the prerogative of nullifying laws and political decisions, by denying their conformity to the Constitution, makes him supreme — the final arbiter — the very Celestial Majesty."

[2] *Taney's Letters to Van Buren in 1860*, in *Maryland Hist. Mag.* (March, 1915), X, 23, letter of June 30, 1860.

lege of determining for himself the constitutionality of the proposed measure. As Taney wrote:

He has been charged with asserting that he, as an Executive officer, had a right to judge for himself whether an act of Congress was constitutional or not, and was not bound to carry it into execution if he believed it to be unconstitutional, even if the Supreme Court decided otherwise; and this misrepresentation has been kept alive for particular purposes of personal ill-will, and has, I learn, been repeated in the Senate during its late session. Yet no intelligent man who reads the message can misunderstand the meaning of the President. He was speaking of his rights and his duty, when acting as a part of the Legislative power, and not of his right or duty as an Executive officer. For when a bill is presented to him and he is to decide whether, by his approval, it shall become a law or not, his power or duty is as purely Legislative as that of a member of Congress, when he is called on to vote for or against a bill. If he has firmly made up his mind that the proposed law is not within the powers of the General Government, he may and he ought to vote against it, notwithstanding an opinion to the contrary has been pronounced by the Supreme Court. It is true that he may very probably yield up his preconceived opinions in deference to that of the Court, because it is the tribunal especially constituted to decide the questions in all cases wherein it may arise, and from its organization and character is peculiarly fitted for such inquiries. But if a Member of Congress, or the President, when acting in his Legislative capacity, has, upon mature consideration, made up his mind that the proposed law is a violation of the Constitution he has sworn to support, and that the Supreme Court had in that respect fallen into error, it is not only his right but his duty to refuse to aid in the passage of the proposed law. And this is all the President has said, and there was nothing new in this. For that principle was asserted and acted upon in relation to the memorable Sedition Law. That Law had been held to be constitutional by every Justice of the Supreme Court before whom it had come at Circuit, and several persons had been punished by fine and imprisonment for offending against

it. Yet a majority in Congress refused to continue the law, avowedly upon the ground that they believed it unconstitutional, notwithstanding the opinion previously pronounced by the judicial tribunals. *But General Jackson never expressed a doubt as to the duty and the obligation upon him in his Executive character to carry into execution any Act of Congress regularly passed, whatever his own opinion might be of the constitutional question.*

All this discussion in 1832 as to Jackson's intention was, however, as has been above pointed out, wholly premature. The Court had adjourned on March 17, without issuing any mandate in the case; nothing could be done in regular course of legal procedure until it reconvened in January, 1833, when, after issue of the mandate and in case of disobedience, it was supposed that the Court would issue a writ of habeas corpus in behalf of the prisoners, or would direct the United States marshal to summon a *posse comitatus* to execute its mandate, or would summon the State officials before it for contempt. Not until after such proceedings could the President be called upon to set in motion the military force of the Nation. It appears, however, that owing to a deficiency in the statute law at that time, there was no method by which the Court could enforce its mandate; for the habeas corpus law then only applied to prisoners in custody under Federal authority, and there was no provision for a writ of error in case a State Court refused to make any record of its action. Advice to this effect was given by William Wirt to a Congressman; and an unsuccessful attempt was made in Congress to secure additional legislation as to judicial process.[1] Wirt further stated

[1] See hitherto unpublished letter in *Wirt Papers MSS*, letter (12 folio pages) from Wirt to Lewis Williams, a Member of Congress, April 28, 1832. *22d Cong., 1st Sess.*, May 28, June 11, 1832, petition for legislation introduced in the House by Pendleton of New York, and debated.

John W. Burgess in *The Middle Period* (1897), 219–220, says: "It was certainly

that he believed that the only remedy was for the President to declare the State of Georgia to be in rebellion and to demand the submission of the State to the law by discharging the prisoners. "If this step cannot be taken, I see none that can. The authority of the Supreme Court is annihilated," he wrote. "Thus the State of Georgia is likely to be victorious at every point, and the President has the pleasure of seeing his will the law of the land. Be it so, I have endeavored to do my duty, in my humble sphere, to vindicate the Constitution, treaties and laws of the United States. If they are prostrated with impunity, the fault will not rest with me. But ought not a consultation to take place among their friends in Congress to see what measures can be devised for the restoration of the National authority?"

The Whigs, in general, believed that Jackson was determined to make a political issue of the case and their views were well represented by a letter written to Webster by Theodore Dwight.[1] "It will be but a very short time before the leading Jackson papers all over the country will come out in favour of Georgia against the Court. . . . As soon as that takes place, . . . it will be the duty of those who favour the Constitution and consider it as worth preservation, to make an effort for that purpose, and, it appears to me, if the necessary pains are taken and in the right manner, a sufficient number of our countrymen can be roused to the support of the Judiciary, and the discomfiture of the

the duty of the President of the United States to have executed this decision of the Court with all the power necessary for the purpose which the Constitution conferred upon him. He did not do it." This statement, like many similar statements by historians and law-writers as to Jackson's refusal to enforce the Court's decree, is erroneous; for the case never reached the stage when the exercise of the President's authority could have been properly called for, or employed.

[1] *Webster Papers MSS*, letter of April 5, 1832.

man and his myrmidons who are obviously bent on sacrificing both the Constitution and the Union. I cannot but believe that, when the point is ascertained that Georgia will resist the execution of the sentence of the Court and General Jackson refuses to enforce it, a majority of the people of this country will support the Constitution."

Such forebodings as to a general attack upon the Judiciary by the Jackson newspapers were not justified; for only a few assailed the correctness of the opinion of the Court, criticizing it as an infringement upon State-Rights;[1] and most of them simply deplored the heated charges made by the Whigs, and counseled exercise of patience, and moderation of language and action both on the part of Georgia and of the anti-Jacksonians. The *New York Courier*, speaking of the Court's opinion as "learned and temperate", said: "Let Georgia ask herself whether the game is worth the candle — whether these treaties with the Indians have not checked the action of the State authorities, — whether their miserable strip of land is worth quarreling about, and keeping alive the

[1] The *Boston Statesman* said: "Of all the attempts made at a 'Federal' consolidation, this last decree of the Supreme Court on the Georgia question is the boldest; though, of all the opinions heretofore given, this is the least creditable to the intellectual character of the Court. There is not a constitutional lawyer in the United States who will not be shocked by the heresies which it contains; there is not any man of any capacity who, after a full examination of it, will not pronounce it to be an open defiance of all common sense, as well as of law and precedent, and a total perversion of the facts of the case." The *Baltimore Republican*, March 21, 1832, said: "Frenzy or infatuation seems to have taken possession of the minds of many of the people of the North in relation to the Indian question. In indulging their sympathy for the Indians in Georgia, they seem to lose sight of all other considerations, and to forget that the State has rights and feelings equal to their own"; see also *ibid.*, March 19, 1832, quoting *Petersburg Intelligencer* (Va.). The *Onondaga Standard* (N. Y.) said: "In regard to the intimation of Judge McLean that upon the enforcement of this decision, depends the resolution of the Court ever to convene again, we have only to say that we trust in heaven they will adhere to their determination. We should rejoice in the event. A new Bench might be organized into which should enter some portion of the spirit of the age." *Niles Register*, XLII, April 14, 1832.

hopes of open and concealed traitors that this Union can be broken down. If Georgia is wise, tranquil, and patient, justice will be done her, and the fanatics will be discomfitted." [1] *Niles Register* said: "The feeling in Georgia, as shown in the remarks in the newspapers etc., is, to go on — let the consequences be what they may; and we notice some proceedings of the people which exhibit an uncalled-for spirit of violence, and speak great things about 'force' and 'judicial despotism', as though a child's play was only concerned in this matter. We are sick of such talks. If there is not power in the Constitution to preserve itself, it's not worth the keeping. But an awful responsibility rests somewhere, and history, too, may give up persons to the infamy of ages. Many, however, entertain a hope that Georgia, being allowed time to get cool, and content with executing her laws over the Indians and their lands, will quietly release Messrs. Worcester and Butler, and so remove the present cause of action — and cast future controversies on their own precarious issue." Some of the more moderate Whig papers joined in these sentiments, the *National Intelligencer* saying that it had "too much confidence in the love of country and the common sense of the Georgian to apprehend that the present collision between the judicial authorities of that State and of the United States will terminate tragically. Let all parties keep their temper as well as they can; let the friends of the

[1] *Washington Globe*, March 31, 1832; and as to this latter, see letter of Ambrose Spencer, to Henry Clay, Dec. 14, 1833, in *Works of Henry Clay* (1904); *Niles Register*, XLII, March 31; *ibid.*, June 23, 1832, reproduced an editorial from the *Cincinnati Gazette*, calling the attention of Georgia to the fact that when Pennsylvania in 1809, in the *Olmstead Case*, came into conflict with the Federal Court, the State of Georgia supported the Court, and that though since that time "both Georgia and Ohio have had their turn at dissatisfaction with the Supreme Court, . . . the Court nevertheless retains the confidence of the Nation, because that confidence is founded in the plain good sense of all, when uninfluenced by extrinsic circumstances." *National Intelligencer*, April 5, 1832.

Union stand firm by the sheet anchor; let no one doubt the safety of the gallant ship." [1]

Meanwhile, the State of Georgia was in process of ferment which was just short of open rebellion. As soon as the decision of the Court had been rendered, its Senator, George M. Troup, had issued an open letter saying: "The people of Georgia will receive with indignant feelings, as they ought, the recent decisions of the Supreme Court, so flagrantly violative of their sovereign rights. I hope the people will treat it, however, as becomes them, with moderation, dignity and firmness; and so treating it, Georgia will be unhurt by what will prove to be a *brutum fulmen*. The Judges know you will not yield obedience to mandates, and they may desire pretexts for enforcement of them which I trust you will not give." Protests, voiced in equally violent terms and of an insurrectionary nature, were made in the newspapers and at public meetings in the State. Finally, when the mandate of the Court was served on the Judge and upon the Clerk of the Georgia Superior Court, motions to reverse the judgment, and to place the mandate on the records of the Court were denied. The two prisoners remained in prison. And everything went on exactly as if the Court had rendered no decision. On November 6, 1832, Governor Lumpkin referred in his message to the Legislature to the decision as, "an attempt to prostrate the sovereignty of the State in the exercise of its constitutional criminal jurisdiction." To the American Board for Foreign Missions, President Jackson had

[1] *National Intelligencer*, April 3, 5, 1832; on March 14, 1832, it printed a copy of the mandate; on March 22, it said that it deplored "the infatuation under the influence of which this course will be pursued;" on March 24, it printed Gov. Troup's letter; on March 27, it quoted the *Newark Advertiser* as stating that it did not doubt that "every State in the Union would promptly furnish the Executive of the Nation its requisite portion of patriotic freemen to aid him in upholding the Judiciary and preserving the integrity of the Nation."

already officially announced his position, the previous year, saying that he was satisfied that the State Legislatures "had power to extend their laws over all persons living within their boundaries," and that he possessed "no authority to interfere." A forged letter, couched in more extreme language and containing caustic comments on the Missionaries as "obnoxious" "by their injudicious zeal," purporting to be written by Jackson to the Board, was widely circulated in many States by Jackson's political opponents.[1]

Such were the conditions of affairs in the fall of 1832, just prior to President Jackson's reëlection; and they had impressed themselves so seriously upon the mind of Chief Justice Marshall as to lead him to write to Judge Story, as follows:[2] "If the prospects of our country inspire you with gloom, how do you think a man must be affected who partakes of all your opinions and whose geographical position enables him to see a great deal that is concealed from you? I yield slowly and reluctantly to the conviction that our Constitution cannot last. I had supposed that North of the Potomack a firm and solid government competent to the security of rational liberty might be preserved. Even that now seems doubtful. The case of the South seems to me to be desperate. Our opinions are incompatible with a united government even among ourselves. The Union has been prolonged thus far by miracles. I fear they cannot continue."

[1] See *Washington Globe*, Oct. 22, 24, 1834, denouncing the letter as a forgery. The letter was quoted in the first edition of this book from *A History of Travel in America* (1915) by Seymour Dunbar, 596, citing the letter in the *St. Joseph Beacon* of South Bend, Ind., Sept. 27, 1832. The fact that the letter was a fabrication for political purposes was pointed out by Bernard C. Steiner, in *Amer. Hist. Rev.* (1924) X, 722, who also printed the actual letter sent by Secretary of War Cass to the American Board of Commissioners for Foreign Missions, Nov. 14, 1831, by Jackson's direction.

[2] *Mass. Hist. Soc. Proc., 2d Series*, XIV, letter of Sept. 22, 1832.

The fears thus expressed as to the sentiment of the North had undoubtedly been enhanced by the fact that, in two other cases, involving Northern States pending before the Court in 1831 and 1832, there had appeared an opposition to its jurisdiction and an outcropping of much the same State-Rights sentiment as was rampant in Georgia and South Carolina. The first was a case which had involved a long conflict and much friction between New York and New Jersey.[1] In a bill in equity brought in *New Jersey* v. *New York*, 3 Pet. 461, in 1829, on motion of William Wirt and Samuel L. Southard, counsel for New Jersey, a subpoena had been awarded by the Court, returnable in August; no appearance having been entered by the State of New York, an alias subpoena had been issued, returnable in January, 1830. Meanwhile, the Attorney-General of New York had written to the Clerk of the Court, July 27, 1829, and to each of the Judges, January 8, 1830, alleging that the State considered such service of process on a State "as utterly void," since the Court could not exercise jurisdiction in controversies between States, without the authority of an Act of Congress carrying into execution that part of the judicial power of the United States. On March 6, 1830, the Court, stating that "the precedent for granting the process has been established upon very grave and solemn argument", in the cases against Georgia and Virginia, forty years before, issued a further subpoena, returnable in August, 1830. Again the State of New York failed to appear. In this refractory attitude, the State Attorney-General was largely supported by the Democrats, but the Whigs assailed what they termed "the Nullification doctrines of the law officer of the State." An

[1] See *Brief History of the Boundary Dispute between New Jersey and New York*, by Joel Parker, *New Jersey Hist. Soc. Proc.*, VIII.

attempt to procure an Act of Congress, said a New York paper, "would be considered by Georgia as a brilliant achievement — being nothing less than enlisting the State of New York under the banner of the State of Georgia in opposition to the legal and constitutional authority of the National Judiciary." [1] New Jersey having moved that this cause be proceeded with in the absence of the State of New York, the Court, after an argument from Wirt as to the existence of its authority to hear cases within the original jurisdiction of the Court without further legislation by Congress, decided that it possessed power to proceed, and it entered an order that, unless the State of New York appeared and answered before August, the Court would hear the cause at the next Term (*New Jersey* v. *New York*, 5 Pet. 284). "The Court has proceeded with great forbearance and moderation towards this State," said the New York paper. "Whatever the object may be, in those under whose influence the State has been placed in the predicament in which it now stands, the loss of jurisdiction over one half of the breadth of the Hudson will probably be the smallest of the evils which may be the consequence of the refusal to acknowledge the legitimate power of the Supreme Court." In 1832, Attorney-General Bronson filed a demurrer denying the Court's jurisdiction, which the Court ruled was to be treated as an appearance (6 Pet. 323); and the direct question of its jurisdiction was then presented for its final decision. The proceedings which followed were vividly described by a Washington correspondent of a Democratic paper, who expressed a belief that the Cherokee and the New York litigation had "some affinity to each other. No one will impute any wrong intention; but this ugly question has been

[1] *New York Daily Advertiser*, Feb. 25, 28, 1831.

put: Why hurry the decision of the *Cherokee Case* and delay that of the *New York Case?* Did the principles growing out of both come in conflict? Some of your city journals have been blaming most erroneously Mr. Bronson, the able Attorney-General of New York for delay. . . . Nothing can be farther from the fact. It was the Court itself which very unceremoniously cut his argument in the middle (after three hours) and sent it over to the next Term. The New York case has been peculiar. It has brought the Supreme Court into a temper of reflection on the subject of State-Rights, more than any case ever before them. It is the first time in the history of our general legislation that a sovereign State ever consented to employ counsel to contest the jurisdiction of the Court. On the first day in which the case was begun, by Mr. Bronson, he entered into a long and learned argument showing the entire unconstitutionality of the jurisdiction assumed by the Court. I understand from good authority that the array of names and authorities in favor of the ground assumed by the Attorney-General of New York startled, in no small degree, the Supreme Bench, particularly the Chief Justice. Mr. Bronson occupied the Court several hours with the argument and yet he had scarcely concluded his first point — the ground of jurisdiction. On the morning of the next day, the Chief Justice, I believe it was, said that as the case had assumed a more important aspect than had been contemplated, the Court had agreed to postpone any further proceeding till next session." [1] The Court never rendered a decision on the delicate question of State sovereignty involved, inasmuch as Congress by the Act of June 28, 1834, consented to a com-

[1] *New York Courier*, March 21, 1832; United States *Telegraph*, March 8, 1832; *National Intelligencer*, March 16, 1832.

promise agreement voluntarily entered into by the States.

The other case which had awakened a feeling of State-Rights in the North was the famous *Charles River Bridge* v. *Warren Bridge*, as to which a bitter fight had been waged in Massachusetts for many years over the right to charter a free bridge in competition with a previously chartered toll bridge. When the case was first argued before the Court, March 7–11, 1831, a committee of the Massachusetts Democratic Convention reported that "in the *Warren Bridge Case* the Supreme Court at Washington has no more constitutional right to meddle with the question than the Court of King's Bench." [1] The case was not decided at this Term, and at the end of the 1832 Term, it was ordered continued, "one Judge before whom the case was argued at the last Term being absent and the Judges differing." [2]

[1] *United States Telegraph*, Jan. 27, 1831.

[2] *National Intelligencer*, March 14, 1832. Judge Story wrote as to this case, March 10, 1831: "We have been sadly obstructed of late in our business by very long and tedious arguments, as distressing to hear as to be nailed down to an old-fashioned homily. We are now upon the *Charlestown Bridge Case*, and have heard the opening counsel on each side in three days. Dutton, for the plaintiffs, made a capital argument in point and manner, lawyerlike, close, searching, and exact; Jones, on the other side, was ingenious, metaphysical, and occasionally strong and striking. Wirt goes on today, and Webster will follow tomorrow. Six Judges only are present, which I regret; Duvall having been called suddenly away by illness of his wife." To Mason, Story wrote, Nov. 19, 1831, that he had prepared his opinion and wished Mason to read it over, saying: "It is so important a constitutional question, that I am anxious that some other mind should see, what the writer rarely can in his zeal, whether there is any weak point which can be fortified or ought to be abandoned." On Dec. 23, 1831, he wrote that his opinion was prepared and that he had written it "in the hope of meeting the doubts of some of the brethren which are various and apply to different aspects of the case." On March 1, 1832, he wrote that the case was not yet decided, as Judge Johnson had been absent for the whole Term, and the Judges were "greatly divided in opinion and it is not certain what the finale will be." *Story*, II, 51, 91; *Mason*. It seems that, as the Court stood in 1832, Story, Marshall and Thompson were in favor of reversing the decree of Massachusetts Court, McLean was doubtful as to jurisdiction, Baldwin dissented, and Johnson and Duval had been absent. When the case was finally decided in 1837, seven Judges took the contrary view, and Story and Thompson dissented; see 11 Peters, 420, 583, App. 2, 134.

Before the Court met to hold its 1833 Term, the situation of the country had been miraculously altered, and the danger of a clash between the Federal and State authorities in the *Missionaries Case* had disappeared. For President Jackson had stepped forward as the staunch and vigorous upholder and defender of the Union, and of the National authority. Startling events had rapidly ensued after Chief Justice Marshall's despondent letter in September, 1832, above quoted. On November 24, 1832, the Legislature of South Carolina had passed its Nullification Ordinance, one section of which constituted a serious attack upon the jurisdiction of the Supreme Court. It provided that in no case in law or equity decided in the Courts of the State, involving the validity of the ordinance or of any Act of Congress, should any appeal be taken or allowed to the Supreme Court of the United States, nor should any copy of the record be permitted or allowed for that purpose; and if any such appeal should be permitted to be taken, the Courts of the State should proceed to execute and enforce their judgments according to the laws and usages of the State, without reference to such attempted appeal, and the person or persons attempting to take such appeal should be dealt with as for contempt of court.[1] This was flat rebellion or treason; and so it was held by President Jackson. He at once issued his celebrated Proclamation, December 10, 1832, and recommended the enactment by Congress of rigorous and radical legislation giving to the Federal Courts and officials adequate powers to deal with the situation. A bill which became known as the Force Bill (or "Bloody Bill") was introduced amidst the hot opposition of the more extreme

[1] To the everlasting honor of the Supreme Court of South Carolina, it held unconstitutional, a year later, the legislation of which this bill was a part. *State* v. *McCreardy* (March, 1834), 2 Hill, 1–282.

State-Rights men. Many of Jackson's former supporters were unable to see any difference between Georgia's refusal to recognize the mandate of the Court in the *Cherokee Cases*, and South Carolina's announcement of a similar intention; and the Calhoun newspapers rang with abuse of Jackson's inconsistency and tyranny. This bill, said the *Richmond Enquirer*, "constitutes Gen. Jackson Monarch of the American Empire, and must be resisted to the death."[1] "Is it not very extraordinary," said the *United States Telegraph*, "no person but a Jackson or Van Buren man can see any essential difference between the cases of Georgia and South Carolina? This is really passing strange. Georgia refuses to obey the decisions of the Federal Judiciary. Not a word is said by the Executive or his minions, except that she is right in doing so. South Carolina says that she will do so at a future period. And the Palace is in arms. Denunciations fall thick and heavy from its enraged occupant."[2]

The debate in Congress, during the months of January and February, 1833, over the passage of the Force Bill evoked once more violent attacks upon the Court and its functions in relation to the States. The transformation, however, of Nullification from a mere theory, as it was in 1830 during the Foote Resolution debate, to an actuality had profoundly modified the views of many of its former upholders; they now saw that it meant either anarchy, subjugation of a State by force or dissolution of the Union; they realized that Webster's great argument in behalf of National supremacy had been fully justified, and that only by submission to the settlement of constitutional questions through

[1] See *National Intelligencer*, Jan. 29, 1833.

[2] *United Stated Telegraph*, Dec. 19, 1832, Jan. 3, 1833; see an interesting letter from Martin Van Buren to Roger B. Taney in 1833, *Maryland Hist. Mag.*, March, 1910, V, describing his attitude and that of Jackson towards Nullification.

judicial decision could peace and Federal unity be preserved; consequently the Court received a stronger and more widely distributed support throughout the debate than had been given to it in Congress for the past fifteen years.[1]

Even before the final passage of the Force Bill, the officials of the State of Georgia perceived that the President's insistence on the supremacy of the National authority in South Carolina would render it impossible for him to countenance disobedience to the mandates of the National Court in any other State; and early in January, a Washington correspondent of a New York paper predicted a settlement of the *Cherokee Case*, writing: "The President has said, since the Proclamation was promulgated, that he would carry any decision the Supreme Court should make in the imprisonment of the missionaries into effect. The Georgians have been restive under the Proclamation, and there is much to induce a belief that they will in some way avoid a direct collision with the General Government." This prophecy was soon fulfilled; for the Governor of Georgia, influenced by the President's determined stand and by political reasons relating to Presidential candidates, finally issued a pardon to the missionaries upon their withdrawal of their suit; and thus the crisis in the history of the Court was averted.[2]

[1] *22d Cong., 2d Sess.*, see speeches in the Senate in support of the Court: Wilkins of Pennsylvania, Jan. 28, 29, 1833, Grundy of Tennessee, Jan. 30, Frelinghuysen of New Jersey, Feb. 3, Holmes of Maine, Feb. 5, Clayton of Delaware; and see violent speeches in the Senate in opposition to the Court by Bibb of Kentucky, Jan. 30, 31, Feb. 1, Poindexter of Mississippi, Jan. 22, Brown of North Carolina, Feb. 4, Tyler of Virginia, Feb. 6, and speeches in the House of Daniel of Kentucky Feb. 28.

[2] *New York Daily Advertiser*, Jan. 16, 1833; the *United States Telegraph* said, Jan. 4, 1833, that the Van Buren Administration had been "intriguing to get Georgia to release the missionaries. By so doing they will avoid the evident collision that would take place if the principles of the Proclamation are carried" — and it said that it was necessary to get Georgia in order not to have it lost to Van Buren; again it said, Jan. 18, that if Georgia were dis-

The settlement of this dangerous litigation, and the inflexible determination of the President to defend the principles of the Union against Nullification, revolutionized the sentiments which had hitherto been held towards him in many parts of the country. "The Proclamation, but more especially the Message, adopt all your principles," wrote Ambrose Spencer to Daniel Webster.[1] "Notwithstanding I am 'the most dangerous man in America', the President specially invited me to drink a glass of wine with him. But what is more remarkable, since his last Proclamation and Message, the Chief Justice and myself have become his warmest supporters, and shall continue so just as long as he maintains the principles contained in them. Who would have dreamed of such an occurrence?" so wrote

posed of, Jackson would "have full play with South Carolina." On Jan. 23 it said as to the issue of the pardon: "They say that they are induced to take this step from considerations of a public nature! What these considerations are does not admit of a doubt. It is that the whole force of the Administration and of the interest which controls the Board of Foreign Missions may be made to bear on South Carolina. It was necessary to keep the South divided, and therefore Georgia, who had been threatened with the bayonet, is to be paid for the desertion of her own principles and bribed into the coalition against South Carolina." See also *United States Telegraph*, Jan. 28, March 12, 1833. One of the missionaries, S. A. Worcester, wrote to their counsel John Sergeant, Jan. 22, 1833, inclosing a copy of a letter which they had sent to Governor Lumpkin, Jan. 8, notifying him of their instructions to counsel to discontinue prosecution of their case. "We beg leave respectfully to state to your Excellency that we have not been led to the adoption of this measure by any change of views in regard to the principles on which we have acted, or by any doubt of the justice of our cause, or of our perfect right to a legal discharge in accordance with the decision of the Supreme Court, in our favor already given, but by the apprehension that the further prosecution of the controversy under existing circumstances, might be attended with consequences injurious to our beloved country." Worcester continued: "We soon learned that the Governor was very much irritated by our assertion of our rights and considered the latter part of our communication as an indignity to the State"; and he said that they had written again to the Governor, Jan. 9, as follows: "We are sorry to be informed that some expressions in our communication of yesterday were regarded by your Excellency as an indignity offered to the State or its authorities. Nothing could be further from our design. In the course we have now taken it has been our intention simply to forbear the prosecution of our case and to leave the question of the continuance of our confinement to the magnanimity of the State." *Niles Register*, XLII, Feb. 16, 1833.

[1] *Webster Papers MSS*, letter of Feb. 21, 1833; *Story*, II, 117, letter of Jan. 27, 1833.

Judge Story of a dinner at the White House, January 27. And since no man gave to Jackson warmer support than his former opponent, Daniel Webster, it was even reported that Jackson was contemplating the appointment of Webster as Chief Justice, in case of Marshall's death.[1]

With this union of Andrew Jackson, Daniel Webster and John Marshall in support of the supremacy of the Nation, the Court, which had done so much to establish such supremacy, now found itself in a stronger position than it had been for the past fifteen years. The attacks directed against it from the moment of its vital decision in *McCulloch* v. *Maryland*, and the Legislative attempts to impair its functions now ceased; and it was not until nearly twenty years later that it became the subject of serious criticism or antagonism by either Congress or the people. In connection with this renewed respect for the Constitution and the renewed confidence in the Court, it should be noted that in this year, 1833, Judge Story published his famous *Commentaries on the Constitution of the United States.* Its appearance was acclaimed, by lawyers and laymen alike, as an important contribution to the defense of the principles on which the American Government had been founded and which had recently been subjected to assault. "Constitutional law, in our day, instead of being the calm occupation of the schools or the curious pursuit of the professional student, has become, as it

[1] James Louis Petigru wrote to Hugh Legaré, March 5, 1833: "But is it not very strange to think of Webster and Jackson? It has been hinted, and I think not improbable, that Webster will be Chief Justice." *Life, Letters and Speeches of James Louis Petigru* (1820), by James Petigru Carson. *Harper's Weekly*, Sept. 20, 1873, quoted Senator Foote of Mississippi, as stating in his reminiscences of R. Y. Hayne, that after development of the Nullification contest, "General Jackson became so great an admirer of the Senator of Massachusetts that he thought seriously of making him Chief Justice of the Supreme Court of the United States upon the decease of the venerable Marshall." See also *New York Courier*, Feb. 8, 1833; *United States Telegraph*, Feb. 8, 1833.

were, an element of real life. The Constitution has been obliged to leave its temple, and come down into the forum and traverse the streets," wrote Edward Everett; and a writer in the *American Jurist* said that the work appeared "very opportunely, since we have most strangely, now at this late day, been unexpectedly thrown back to the very threshold, to the agitation of the question whether we have, in fact, any constitution of government, or are entirely destitute of a supreme law; and which is, in effect, equivalent, whether we have any tribunal to interpret and apply, and an authority to enforce that law." And Marshall wrote to Story: "I greatly fear that south of the Potomack, where it is most wanted, it will be least used. It is a Mohammedan rule, I understand, 'never to dispute with the ignorant', and we of the true faith in the South abjure the contamination of infidel political works. It would give our orthodox nullifyer a fever to read the heresies of your Commentaries.[1] . . . Nothing in their view is to be feared but that bugbear, consolidation; and every exercise of legitimate power is construed into a breach of the Constitution. Your book, if read, will tend to remove these prejudices."

[1] *North Amer. Rev.* (1834), XXXVIII, 65; *Amer. Jurist* (April, 1833); *Mass. Hist. Soc. Proc., 2d Series*, XIV, letters of April 24, June 3, 1833.

NOTE. That Jackson upheld the power of the Court to determine the validity of Acts of Congress seems to be clear; for in a letter from Washington in the *Mobile Commercial Register*, April 23, 1834, a conversation is reported between a Georgia delegation and the President in which Jackson said, "that the power of deciding on the constitutionality of the laws belongs to the Judiciary, and that his own power extended only to see that they were executed."

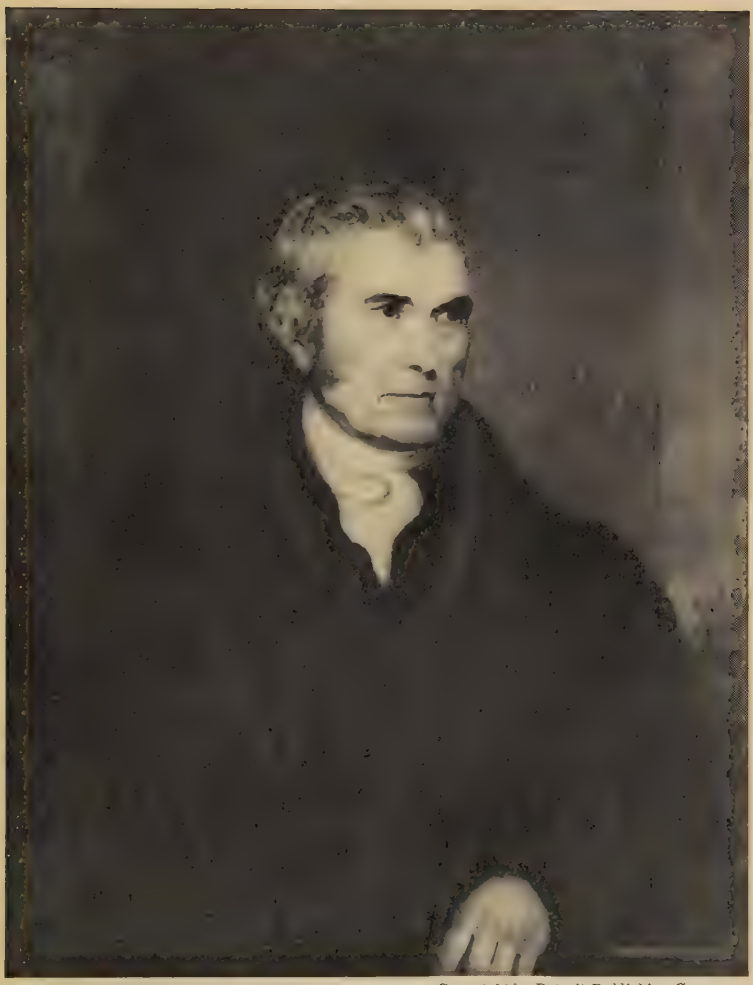
The Act of March 2, 1833, known as the Force Bill, was the first permanent statute enlarging the jurisdiction of the United States Circuit Courts and extending Federal authority. It provided for removal into those Courts of any suit or prosecution commenced in a State Court against any Federal officer or other person for any act done under the Federal revenue laws; and also habeas corpus in cases of prisoners in State jails committed for any act done or omitted in pursuance of a Federal law. See *Federal Criminal Laws and the State Courts*, by Charles Warren, *Harv. Law Rev.* (1925), XXXVIII.

CHAPTER TWENTY

THE LAST YEARS OF CHIEF JUSTICE MARSHALL

1833–1835

For the two years succeeding the subsidence of the Nullification movement, the Court ceased temporarily to be a center of sectional or political attack. Its time was chiefly occupied with cases involving great commercial questions and landed interests; but at the 1833 Term, it delivered the last of the series of vital decisions on constitutional law which had made the Chief Justiceship of John Marshall so memorable an era in American history. In *Barron* v. *Baltimore*, 7 Pet. 243, the Court finally determined the Amendments to the Constitution to be limitations only on Congressional action and not applicable to State legislation. "These Amendments demanded security against the apprehended encroachments of the General Government, not against those of the local governments," Marshall said. "The great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers, which the patriot statesmen who then watched over the interests of our country deemed essential to Union, and to the attainment of those invaluable objects for which Union was sought, might be exercised in a manner dangerous to liberty." It is a striking fact that this last of Marshall's opinions on this branch of law should have been delivered in limitation of the opera-



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JOHN MARSHALL

From the portrait by Robert M. Sully.

tion of the Constitution, whose undue extension he had been so long charged with seeking.

At the 1834 Term the Court was confronted with an immense number of suits based on land claims arising out of the Spanish Treaty of 1819; and in *United States* v. *Clarke*, 8 Pet. 436, Chief Justice Marshall reaffirmed an opinion, delivered three years before, the doctrines laid down in which determined the whole future policy of the United States with respect to its public lands acquired by cession or compact. By its treaty with Spain of February 22, 1819, the United States had put an end to the serious controversies over alleged breaches of neutrality, spoliation claims and the boundaries of Florida and Louisiana. Under this treaty, while relinquishing all its claims to land in the ceded territories, Spain provided that all grants made therein by the King or his lawful authorities prior to January 24, 1818, should be "ratified and confirmed to the person in the possession of the lands to the same extent that the same grants would be valid", if the territory had remained in Spain's hands. During the long period while this treaty was pending, awaiting final ratification, a vast number of grants had been hurriedly made by Spanish officials in Florida and elsewhere, many of them without authority, many by fraud of subordinate officers, many with conditions attached which were never performed or expected to be performed by the grantees. Congress, confronted with this abnormal situation, provided a judicial machinery for establishment of these land claims; but so great a flood of claimants had appeared that it seemed as if no land would be left for the public in the newly acquired territory. Rarely did a claimant present the original document establishing his grant; nor were such originals to be found in the offices of the

keepers of public archives; copies of Spanish documents, coupled with the flimsiest excuses for the non-production of original certificates from notoriously rascally Spanish officials, and papers bearing every earmark of fraud and forgery, constituted the chief evidence for many of the claims presented; and as John Quincy Adams, himself, said, a demand for production of the archives would result in little advantage, for "the chance was that the archives would follow from the grant, instead of the grant from the archives . . . the office of archivist was purchasable."[1] Similar conditions prevailed in Louisiana and Missouri under the Louisiana Treaty of Cession in 1803. Such was the situation when the case of *United States* v. *Arredondo*, 6 Pet. 691, involving a claim to about 300,000 acres in Florida, came before the Court in 1832. Its importance amply warranted the length of its argument (from March 2 to 7), and the array of notable counsel — Richard K. Call of Florida, William Wirt and Attorney-General Roger B. Taney against Joseph M. White of Florida, John M. Berrien of Georgia and Daniel Webster. Few decisions of the Court at this period had a more permanent effect upon the history of the country; for in this case the Court established the public land policy of the Government on the basis of the most scrupulous respect for treaties, preferring to preserve the honor, rather than the property of the government, and to run the risk of confirming possibly fraudulent claims rather than to impair the reputation of the Government with foreign nations. In a superb opinion by Judge Baldwin, the Court had laid down the broad principle that, if a grant was made by a public official purporting to be in accordance with the laws of the sovereign power for which he was acting, there was a

[1] *J. Q. Adams*, VIII, March 9, 1830.

legal presumption that it was a valid official act, and that the burden rested on the United States to prove lack of authority.[1] It was also held that the treaty was intended to protect all rights in land of any nature, and that in case of grants with conditions attached, the Court would consider the facts presented by the claimants in excuse of non-performance of conditions, and would construe liberally such excuses. These doctrines were again emphasized by Marshall in the *Clarke Case* in 1834. "He who would controvert a grant executed by the lawful authority, with all the solemnities required by law, takes upon himself the burden of showing that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud." And they were consistently adhered to by the Court in the long series of cases (over ninety in number) which arose, in the succeeding twenty years, in Florida, Arkansas, Louisiana and Missouri. The fact that a large number of these Spanish claims had been assigned to and were being prosecuted by bankers, financiers and speculators in New York and London had given to President Jackson, in his fight with the financial interests, a vivid interest in the outcome of these cases. Consequently, the decisions of the Court upholding the claims were a great disappointment and gave grave offense to the President, so much so, that, as reported in the newspapers, "he sent for Judge Baldwin, who drew up the opinion of the Court, and gave him a lecture, and if he had been subject to Executive power, he would un-

[1] The Washington correspondent of the *New York Courier*, writing March 17, 1832, said: "Today Judge Baldwin of the Supreme Court gave a most able and interesting opinion on the great Florida land case. It was in favor of the claimants. The numerous local facts, the great knowledge displayed of the historical and other records of Florida bearing on the case were principally drawn from the able argument of Col. White, who has conducted the case with uncommon learning and research. In many respects, besides to the claimants, this opinion has deep and abiding interest, from the glimpses it gives of the opinions of the Court on questions *non coram judice*, as the learned lawyers say."

doubtedly have made him walk Spanish." [1] As Baldwin was an appointee of Jackson, the episode forms another striking illustration of the independence of the Judiciary from Executive influence. In later years, when the claims for land in California and New Mexico under the Mexican Treaty of 1848 began to flood the Courts, the doctrines laid down by the Court were severely criticized by Government counsel, as unwarrantably hampering the efforts to preserve the public domain from fraudulent claimants; and it is undeniable that the Court's decision resulted in the unjust enrichment of many speculators whose claims possessed no legal foundation.[2] On the other hand, if the Court had held that the burden was on the claimant to prove, rather than on the Government to disprove, the authority of the public official making the grant, such a decision would have been, as Judge Baldwin said, "an entire novelty in our jurisprudence", and would have entailed consequences of the most sweeping nature to all land titles theretofore established in the older parts of the United States. While the area of the public lands of the United States might have been increased, had the Court construed the treaty more strictly against private claimants, the policy which the Court adopted gave to the world conclusive proof of its devotion to the theory of the sanctity of treaties; and as Judge Baldwin said: "Nothing can tend so much to their interest, to preserve their high position at home and abroad, as for the United

[1] *National Gazette*, Feb. 6, 1834; *New York Daily Advertiser* said, Feb. 4, 1834: "It appears that the old hero has set his heart against the confirmation of all the Spanish titles in Florida, and has the causes continued from year to year, to send his agents all over the world to find out something on which to found his objections and justify his deep-rooted prejudices."

[2] See this view of the law of the cases by a recent Socialist historian of the Court in an able, but non-judicial and sometimes inaccurate, presentation of numerous facts, many of which do not appear in the Court records. *History of the Supreme Court of the United States* (1912), by Gustavus Myers.

States to consider this treaty to have consummated all the great objects which it was intended to effect. . . . The protection and maintenance of the rights of private property in the disputed territory may conduce more to the honor and interest of the United States than a contrary course, which, in my opinion, will cause injury to their fame and hazard to their power." [1]

Next in importance to the land cases, at this 1834 Term was the noted case of *Wheaton* v. *Peters*, 8 Pet. 591, a suit by the old Reporter of the Court against the present Reporter for alleged violation of copyright, argued by Webster against Charles J. Ingersoll and John Sergeant.[2] Wheaton, having failed to comply with the technical requirements of the Federal copyright law, attempted to maintain his copyright at common law; but the Court, through Judge McLean, decided against him, and reaffirmed its doctrine, laid down twenty years before, that: "It is clear there can be no common law of the United States. The Federal Government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our Federal system only by legislative adoption." Of this decision, ex-Chancellor Kent wrote to Judge Story a letter full of pessimism as to existing conditions in American politics: [3]

[1] *Lessee of Pollard's Heirs* v. *Kibbe* (1840), 14 Pet. 353.

[2] Horace Binney wrote to John Sergeant, Jan. 15, 1834, inclosing a letter to Sergeant from the Reporter, Richard Peters, in which the latter said: "I will endeavor to give you as little trouble as possible in the case. . . . Mr. Wheaton is here and looks 'very mad.'" *John Sergeant Papers MSS.*

[3] *Mass. Hist. Soc. Proc., 2d Series*, XIV, letter of April 11, 1834. See also curious note by Kent on Story's views and Commentaries, in *Amer. Law Rev.* (1870), V, 368.

I don't feel satisfied that you or the Ch. J. did not write an opinion on the copyright case, & discuss the grounds of the claim at criminal law. It would appear to me to have fairly presented itself as a new question for discussion in our American jurisprudence. I don't complain of the decision on the point. It is more than probable I should have been of the same opinion had I studied the case; but that imposing brief of Mr. Wheaton ought to have been met by one of the only two men who could have met it with a giant's force. . . . To deny the common law right and to construe the statute right with such severity is not palatable to us humble authors. However, when the case comes to be reported I shall be better able to judge of the merits of the two principal questions, and I should not have said anything but in entire confidence and with the utmost attachment to the Court and its reputation. In these wretched times I am for sustaining the Supreme Court with my utmost efforts. My despair is a little over. Light breaks in upon the gloom. The complete revolution in Connecticut; the immense changes (almost without effort) in the interior of this State, and the results of the awful and tremendous election in this city, animate me. I look upon Jackson as a detestable, ignorant, reckless, vain and malignant tyrant, and I think the country begin to open their eyes in astonishment and see things in the true light. This American elective monarchy frightens me. The experiment, with its foundation laid on universal suffrage and an unfettered and licentious press, is of too violent a nature for our excitable people. We have not in our large cities, if we have in our country, moral firmness enough to bear it. *It racks the machine too much.* . . .

To this Story replied:[1]

I am sorry for the controversy between Mr. Wheaton and Peters, and did all I could to prevent a public discussion of the delicate subject of copyright. . . . The strict construction of the statute of Congress we adopted with vast reluctance, but after turning it fully and freely to our minds, the majority of the Court did not see how they could give any other construction to it. I wish Congress would make some

[1] *Story*, II, 181, letter of May 17, 1834.

additional provision on the subject to protect authors, of whom I think no one more meritorious than Mr. Wheaton. You, as a Judge, have frequently had occasion to know how many bitter cups we are not at liberty to pass by. . . . Your views of politics and men run exactly in the same mould as mine.

The argument of another case at this Term, *Binney* v. *Chesapeake and Ohio Canal*, 8 Pet. 201, involving the navigation of the Potomac River at Little Falls above the city of Washington was amusingly described by an auditor in the Court-room, Charles Sumner: "Mr. F. S. Key is now speaking in the Supreme Court, where I write these lines. The case before the Court is an important one — Key, Walter Jones and Webster on one side and (Richard S.) Coxe and (Thomas) Swann on the other. Key has not prepared himself, and now speaks from his preparation on the trial below, relying upon a quickness and facility of language rather than upon research. Walter Jones — a man of acknowledged powers in the law, unsurpassed, if not unequalled, by any lawyer in the country — is in the same plight. He is now conning his papers and maturing his points — a labor which of course he should have gone through before he entered the Court room. And *our* Webster fills up the remiss triumvirate. He, like Jones, is doing the labor in Court which should have been done out of Court. In fact, politics have entirely swamped his whole time and talents. All here declare that he has neglected his cases this Term in a remarkable manner. It is now whispered in the room that he has not looked at the present case, though the amount at stake is estimated at half a million dollars." [1]

[1] *Sumner*, I, 135. Webster wrote to Jeremiah Mason, Feb. 6, 1835: "My habits, I must confess . . . render it more agreeable to me to attend to political than to professional subjects. But I have not lost all relish for the Bar. I can

In *Carrington* v. *Merchants Insurance Company*, 8 Pet. 495, argued by Horace Binney and John Sergeant against Daniel Webster and Franklin Dexter of Massachusetts, an American trader dealing in contraband goods with Peru was held to forfeit his ship to a Spanish captor, even after he had landed the contraband, owing to the fact that he sailed with false papers and a disguised destination. Judge Story insisted with the utmost vigor on the duty of neutrals to act without fraud themselves, if they desired to assert rights against a belligerent. This case gave rise to a striking criticism by Charles J. Ingersoll of the effect of Webster's arguments: "Mr. Webster's professional influence, much more signal than his political, has succeeded in corrupting American jurisprudence with some of the most extravagant and intolerable dogmas of the English code — nay, what would now be rejected by it. What may be deemed his first great effort in the Supreme Court was in the case of the Dartmouth College, when he induced that tribunal to carry the corporation privilege beyond all bounds, owing, as has been thought, to the absence of Pinkney who was opposed to him; and his latest labor there, in the case of a Boston Insurance Company, prevailed over a majority of the Bench to adopt one of the most unwarrantable aberrations of the English maritime policy from the law of nations; in the first mentioned case against the sound judgment of one dissentient Democrat on the Bench, and the law as taught from Locke to Hallam; in the last against the judgment of all the Democrats

still make something by the practice; and by remaining in the Senate, I am making sacrifices which my circumstances do not justify. . . . I find it inconvenient to push my practice in the Supreme Court, while a member of the Senate, and I am inclined under any view of the future to decline engagements hereafter in that Court, unless under special circumstance." *Webster Papers MSS.*

on the Bench and the law of all nations except modern Great Britain." [1]

In the midst of this case, "the Court, having been informed of the decease of Mr. Wirt, an exalted member of this Bar, in order to manifest the sense entertained by the Court of this deep loss immediately adjourned"; and on the next day, in response to a resolution of the Bar, moved by Attorney-General Benjamin F. Butler, the Chief Justice said: "We too, gentlemen, have sustained a loss it will be difficult, if not impossible to repair. In performing the arduous duties assigned to us, we have been long aided by the diligent research and lucid reasoning of him whose loss we unite with you in deploring. We, too, gentlemen, in common with you have lost the estimable friend in the powerful advocate." [2] Thereupon, the Court resolved "to wear the usual badge of mourning during the residue of this Term, in token of their respect and regard for the memory of the deceased, and of their deep sense of this afflicting event." This striking tribute has been paid by the Court to but few members of the Bar other than Pinkney and Wirt.

The transition stage, through which the Court was now passing was very clearly shown at this Term by the difficulty which the Court experienced in deciding several important cases which had been pending for some time. Of the older Judges, Johnson and Duval were incapacitated and absent much of the time; and the new Judges, Thompson, McLean and Baldwin,

[1] *Life of Charles J. Ingersoll* (1897), 192, by William M. Meigs, see Ingersoll's speech of July 4, 1835. Horace Binney wrote of the case, Feb. 18, 1834: "Resumed my argument in the Supreme Court with some freshness and pretty good effect. I went on till one, when the Court adjourned in consequence of the death of Mr. Wirt," and (later), "I thought I had satisfied the Court (I did satisfy Chief Justice Marshall) that England had wrested the old-established law of nations as to contraband in her favour. The continentals are much more impartial, and more disposed to favour the weak, the neutral, and the peaceable and so it ought to be."

[2] *National Intelligencer*, Feb. 19, 20, 1834.

differed frequently from Marshall and Story. Consequently the Chief Justice at the close of the Term announced that the three constitutional cases — *Charles River Bridge* v. *Warren Bridge*, *Briscoe* v. *Commonwealth Bank of Kentucky* and *New York* v. *Miln* — then pending, would be continued, and he said: "The practice of this Court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved unless four Judges concur in opinion, thus making the decision that of a majority of the whole Court." [1]

Of the Supreme Court, as it appeared in these closing years of Chief Justice Marshall's life, vivid pictures have been given by contemporary writers. Harriet Martineau wrote in 1835: [2]

I have watched the assemblage while the Chief Justice was delivering a judgment, the three Judges on either hand gazing at him more like learners than associates; Webster standing firm as a rock, his large, deep-set eyes wide awake, his lips compressed, and his whole countenance in that intent stillness which easily fixes the gaze of the stranger. Clay leaning against the desk in an attitude whose grace contrasts strangely with the slovenly make of his dress, his snuff box for the moment unopened in his hand, his small grey eye,

[1] These cases were again continued in 1835, when Marshall said in answer to any inquiry whether the Court had come to a final decision as to reargument of the cases, that as the Court was then composed, it would not take them up (two of the Judges being absent, and only three of the remaining five concurring in opinion); see 9 Peters, 85, and argument of A. H. Garland in *Brenham* v. *Bank* (1892), 144 U. S. 549; *New York* v. *Miln* (1843), 8 Pet. 122. As late as 1824, a decision had been rendered by a minority of the Court — in *Renner* v. *Bank of Columbia*, 9 Wheat. 581. As already shown, the charge had been frequently made that in the important case of *Green* v. *Biddle* in 1823, involving the constitutionality of the Kentucky occupying claimant laws, the decision was that of less than a majority of the Judges, and bitter attacks had been made on the Court in Congress, in consequence. See also comments of Baldwin, J., on the decision of *Livingston* v. *Story* (1837), 11 Pet. 399, as to the decision of the prior case in 1835 (9 Pet. 632) by three out of five Judges present.

[2] *Retrospect of Western Travel* (1838), by Harriet Martineau, I, 143, 165. See also description of the manner of argument before the Court and especially of Webster in *Men and Manners in America* (1833), by Dana Hamilton.

and placid half-smile conveying an expression of pleasure, which redeems his face from its usual unaccountable commonness. The Attorney-General, his fingers playing among his papers, his quick black eye and thin tremulous lips for once fixed, his small face, pale with thought, contrasting remarkably with the other two; these men, absorbed in what they were listening to, thinking neither of themselves nor of each other, while they are watched by the groups of idlers and listeners around them; the newspaper corps, the dark Cherokee chiefs, the stragglers from the far West, the gay ladies in their waving plumes, and the members of either House that have stepped in to listen; all these I have seen at one moment constitute one silent assemblage, while the mild voice of the aged Chief Justice sounded through the Court. . . . There is no tolerable portrait of Judge Story, and there never will be . . . the quick smile, the glistening eye, the gleeful tone, with passing touches of sentiment; the innocent self-complacency, the confiding, devoted affections of the great American lawyer. . . . It was amusing to see how the Court would fill after the entrance of Webster, and empty when he had gone back to the Senate Chamber. The chief interest to me in Webster's pleading, and also in his speaking in the Senate, was from seeing one so dreamy and nonchalant, roused into strong excitement. Webster is a lover of ease and pleasure, and has an air of the most unaffected indolence and careless self-sufficiency. It is something to see him moved with anxiety, and the toil of intellectual conflict; to see his lips tremble, his nostrils expand, the perspiration start upon his brow; to hear his voice vary with emotion.

Charles Sumner, in 1834, thus depicted the personal life of the Judges of this time:[1]

[1] *Sumner*, I, 135, 136, two letters of March 3, 1834.

Ben Perley Poore in his *Reminiscences of Sixty Years at the Metropolis* (1886), 222, 295, referring to the Court about 1837 said: "Their Honors, the Justices, were rather a jovial set, especially Justice Story, who used to assert that every man should laugh at least an hour during each day, and who had himself a great fund of humorous anecdotes. . . . The best Madeira was that labelled 'The Supreme Court', as their Honors, the Justices, used to make a direct importation every year, and sip it as they consulted over the cases before them, every day after dinner, when the cloth had been removed." In 1831, Marshall appears to have been much disturbed at a proposal to change the lodgings of the Judges to

Every day's attendance in the political part of the Capitol shows me clearly that all speeches there are delivered to the people beyond, and not to Senators and Representatives present. In the Supreme Court, the object of speaking is to convince. The more I see of politics the more I learn to love law. . . . Since last I wrote, I have seen many great men and attended at the Capitol every day, making the Supreme Court (which is on the lower floor in a dark room, almost down cellar) my first object of attention. . . . All the Judges board together, having rooms in the same house and taking their meals from the same table, except Judge McLean whose wife is with him, and who consequently has a separate table, though in the same house. I dined with them yesterday; being Sunday, Judges Marshall, Story, Thompson and Duval were present who, with myself, made up the company, with two waiters in attendance. Sunday here is a much gayer day than with us. No conversation is forbidden, and nothing which goes to cause cheerfulness, if not hilarity. The world and all its things are talked of as much as on any other day. Judge Marshall is a model of simplicity — "in wit a man, simplicity a child." He is naturally taciturn, and yet ready to laugh; to joke and to be joked with. Judge Thompson is a kind-hearted man, now somewhat depressed from the loss of his wife. Judge Duval is 82 years old and is so deaf as to be unable to participate in conversation.

And George Bancroft, in 1832, recorded his impressions of the Judges as follows: [1]

a house, situated "between the palace and Georgetown", which he feared would not be approved by all the Judges, and which might cause them to scatter; see letters to Story May 3, Oct. 12, Nov. 10, 1831; *Mass. Hist. Soc. Proc., 2d Ser.*, XIV. In 1845, the practice of rooming together was partially broken up; the Chief Justice with three of his Associates living in one boarding house, while three lived at a hotel, and the others in private houses. In 1850, the Judges entirely abandoned the practice — the "mess style" as it was called; and five lived in various boarding houses, and four in various hotels and private houses. *Pictures of the City of Washington in the Past* (1895), by Samuel C. Busey.

[1] *Life and Letters of George Bancroft* (1908), by Mark A. DeW. Howe, I, 202, letter of Jan. 23, 1832. A striking personal description of Chief Justice Marshall appeared in the *Norfolk Beacon*, in May, 1835: "He was tall and awkward in his movements. His eyes were black and remarkably fine. They told the tale of his genius, despite his careless dress and ungainly demeanour. The spectator was astonished at the smallness of his head; it was the smallest he had ever seen,

We went to call upon Judge Story, and we found there Judge Baldwin and Chief Justice Marshall. I drew my chair close up to the latter, nor can you readily conceive of the great suavity or rather calmness of manner by which he is distinguished. In conversation, he makes no display nor is he remarkable except for this venerable coolness of manner. There are about him no marks of genius, but in his entire collectedness, great precision and calm uniformity, you may discern the signs of an unerring judgment. He is by all acknowledged to stand foremost on the bench of the Supreme Court, a first rate *man* in the first class of greatness. He has travelled very little; has not been in New England since the War; has hardly seen New York, but has lived in the regular exercise of his judicial functions, unincumbered by other care than that of giving character and respectability to the Bench over which he presides. Judge Baldwin thinks more of tariff than he does of law, but he is an agreeable man, full of vivacity, and a thorough advocate of the protective system.

The less serious side of the Judge's life was touched upon by Story in a letter to his wife, in 1833: [1]

The Court opened on Monday last, and all the Judges were present, except Judge Baldwin. They were in good health, and the Chief Justice looked more vigorous than usual. He seemed to revive and enjoy anew his green, old age. . . . We have had little to do this week in Court, for it is always difficult for some days to get business in a steady train. The lawyers are tardy and reluctant, and they move with unequal efforts at first. Having some leisure on our hands, the Chief Justice and myself have devoted some of it to attendance upon the theatre to hear Miss Fanny Kemble. . . . We attended on Monday night, and on the Chief Justice's entrance into the box, he was cheered in a marked

unless he had been fortunate enough to see John Randolph, and, as we are told, Lord Byron's." *National Intelligencer*, July 11, 1835.

[1] *Story*, II, 116, letter of Jan. 20, 1833. Writing Jan. 27, 1837, Story described a dinner attended by the Judges at the Secretary of State's (Edward Livingston) "being invited to dinner at half past five and actually sitting down to the table at half past seven; so that we have reached at Washington the fashionable hour of St. James'."

manner. He behaved as he always does, with extreme modesty, and seemed not to know that the compliment was designed for him. We have seen Miss Kemble as Julia in The Hunchback, and as Mrs. Haller in The Stranger. . . . In Mrs. Haller she threw the whole audience into tears. The Chief Justice shed them in common with younger eyes.

On August 4, 1834, Judge Johnson died, after a service of thirty years on the Bench marked by a high degree of independence and by a series of opinions noted for individuality and freedom of expressive phrase.[1] As this vacancy occurred at a time when the warfare between the President and the Senate over the removal of the Government deposits from the Bank of the United States was at its height, and only six weeks after the Senate had refused to confirm the appointment of Roger B. Taney as Secretary of the Treasury because of his participation in the removal, the Whigs gravely feared lest the President might seek now to appoint Taney to the Bench. It is not probable, however, that Jackson contemplated such a move, as the appointment would properly go to the South. After considering for some months the names

[1] See *National Gazette*, Jan. 10, 1835; the *New York Courier*, a supporter of the Bank of the United States, within a few days after Judge Johnson's death had said that Taney's nomination should be "rejected by an overwhelming majority", that the attention of the press and public must be awakened, and it said: "Let the Senate beware that they do not contribute to the promotion of a mere political driveller who would sell his birthright for a mess of pottage. Let them beware that they do not advise and consent to the foul pollution of the judicial ermine." To this violent and unjustified invective, the *Albany Argus*, Aug. 11, 1834, replied in an editorial, headed "Bank Insolence, Designs of the Bank upon the Judiciary", in which it deplored the indecent haste of the *Courier* in discussing a successor to Johnson before his remains were consigned to the grave; and the *Argus* praised Taney as incorruptible and well fitted for appointment; and attacked the "insolent and corrupt moneyed corporation" which was thus apparently through the press attempting to dictate to the President and Senate. Of this situation, Van Buren wrote to Jackson, Aug. 12, 1834: "The opposition papers are waxing warm upon the subject of the vacant seat on the Bench and swear, in substance, that it shall be filled by none but a friend of the Bank. I shall endeavor to obtain an article from the *Albany Argus*, showing the ground taken upon the subject here, and send it to you." *Van Buren Papers MSS.*

of James Louis Petigru,[1] Hugh Legaré and William Drayton, all of South Carolina, who were actively urged upon him, Jackson appointed on January 5, 1835, his close friend and supporter, James M. Wayne of Georgia. Wayne was forty-five years old; he had been for five years a Judge of the Supreme Court in Georgia, and later, as a Democratic member of Congress, had been an active Union man, advocating all measures directed against Nullification. For this reason, his appointment was generally acceptable both to the Whigs and to the Jackson Democrats. "Few Whigs would hesitate to acknowledge," said the Whig Bank paper in Philadelphia, "that Judge Wayne is preferable for the bench of the Supreme Court to some other candidate of the Jackson party." "The appointment seems to be acceptable generally," said a New York Whig paper. "He is a gentleman of great urbanity, a high-minded, honorable man. I know nothing of his legal talents, but in the present state of the country and of parties, I consider the selection judicious, and incomparably better than I anticipated." "No unworthy motives, I think, will ever influence his decision," said another New York paper. "Mr. Wayne's character as a Republican of talent, education, firmness and honesty is well known," said the Democratic *New York Evening Post.*[2] "Mr. Wayne has taken his seat on the Bench," said *Niles Register*, "of which lofty place all parties agree on considering him worthy, believing that he will not be a partisan Judge. This is a compliment to be proud of, in times like the present." Thus far, President Jackson had had three opportu-

[1] *Life, Letters and Speeches of James Louis Petigru* (1920), by James Petigru Carson, letter to Drayton, Aug. 12, 1834, letter to Legaré, Nov. 29, 1834.

[2] *New York Journal of Commerce*, Jan. 16, 1835; *New York Courier*, Jan. 10, 1835; *New York Evening Post*, Jan. 12, 1838; *Niles Register*, XLVII, Jan. 17, 1835.

nities to make appointments on the Supreme Bench, and in each case he had surprised his political opponents, who charged him with reckless, political motives, by appointing lawyers of high capacity; and the reputation of the Court, so far from suffering, had been established on a firm basis. "Its hall," said *Niles Register* (which had been out of sympathy with the Court for many years), "is 'the cave of Trophonius' or of oracles, as John Randolph called it in the asperity of his temper; but many of its formerly supposed errors have become acknowledged truths by the silent yet sure operations of Time; and if some of its decisions are still regarded wrong (though very few, if any, are generally so) it is accepted that they were the result of an honest and enlightened judgment. . . . For so it is that law-makers, as well as Judges, are not infallible, and that 'angels do not descend' to give us unerring Legislative, Executive or Judicial decision. Perfection is not hoped for; and all that can be expected is the honest judgment of independent and intelligent individuals, who, in the frailty of human nature, are liable to error, however zealously they may strive to avoid it."

In curious contrast to this optimistic attitude towards the Court, Ex-Chancellor Kent's account of an interview at this time with Judge Story is striking: "He says that Hamilton was the greatest and wisest man of this country. He saw fifty years ahead, and what he saw then is *fact now*. Next to him in wisdom and sense, intuitive rectitude and truth and judgment is Ch. J. Marshall. He says all sensible men at Washington, in private conversation, admit that the Government is deplorably weak, factious, and corrupt. That everything is sinking down into despotism, under the disguise of a democratic government. He says the

Sup. Court is sinking, and so is the judicial in every State. We began with first-rate men for judicial trusts, and we have now got down to the third-rate. In twenty-five years there will not be a Judge in the U. S. who will not be made elective, and for short periods and on slender salaries. Our Constitutions were all framed for man as he *should be* and not for man *as he is and ever will be.*" [1]

Before the Court met for its 1835 Term, a further vacancy on the Bench occurred through the resignation of Judge Duval who was eighty-two years old, almost totally deaf, and worn out from his service of twenty-four years.[2] Duval's death or resignation had been expected for nearly six years, and as early as 1829, President Jackson had promised the position to Louis McLane of Delaware. In August, 1831, McLane hoped to receive appointment on the resignation of Judge Baldwin, which was daily expected to occur. Though Baldwin had then been on the Bench for only two years, his dissatisfaction with the trend of the Court's opinions was so great that he had determined to retire.[3] At the 1831 Term, he had dissented in seven cases, and in one he had expressed with much heat his view of the extensions of jurisdiction which he considered the Court had unwarrantably made.

[1] *Amer. Law Rev.* (1871), V, 368, report of interview, March 18, 1835.

[2] Tappan of Ohio said in the House, Jan. 16, 1843: "Judge Duval sat on the Bench more than ten years after he had become so deaf that he could not hear a word that was spoken in Court." *28th Cong., 1st Sess.* The *New York Evening Post* (then a Democratic paper) said, Jan. 17, 1835, that the report of Duval's resignation was "good news if true. . . . We have it on the testimony of a highly respectable Member of Congress that Judge Duval 'has not heard an argument for ten years past, though a person by no means above the necessity of such aids to his judgment.' The Nation does not contain a man whose elevation to the vacant place would be so generally acceptable to the great body of the people as that of Mr. Taney, the victim of the factious and malignant coalition of Bank aristocrats in the United States Senate."

[3] See *Ex parte Crane*, 5 Pet. 190. Van Buren wrote to McLane in August, 1831: "Judge Baldwin is dissatisfied with his situation, for reasons which it is unnecessary to explain further than they grow out of opposition to what he regards as an

"Judges do not sit on cushions of down while administering the supreme law of the land in this Court," he had said. "Fully satisfied that on the discreet exercise of the powers of this Court, much of the strength and public usefulness of the Government depends, I have no fear that its judgments will ever cease to command the support and confidence of the country, while they are applied only to subjects clearly within the judicial power, according to the laws. . . . But I do most seriously apprehend consequences of the most alarming kind by the extensions of its powers." Pressure from the President induced Baldwin to remain on the Court. When the vacancy finally occurred, through Duval's resignation, McLane and the President were no longer on friendly terms; and on January 15, 1835, Jackson nominated to the position his former Attorney-General and Secretary of the Treasury, Roger B. Taney of Maryland. This act aroused intense political excitement. For the past two years, a storm of partisan passion had raged over the removal of the Government deposits from the United States Bank, ordered by Jackson and carried out by Taney. The Whigs, aided by Calhoun's adherents, had refused to confirm Taney as Secretary of the Treasury, and this appointment to the Bench, which they regarded as a reward for Taney's "servility," seemed to them an unbearable act of effrontery on the part of the President. Their wrath was unbounded, their denunciations of the nominee were violent in the extreme, and they thrust aside all consideration of his

unwarrantable extension of its powers by the Court, and has given the President notice of his intention to resign." *Amer. Hist. Ass. Rep.* (1918), II, 578; see also letter of Van Buren to Jackson, Aug. 3, 1831, hoping that McLane would be appointed if Duval should die; letter of McLane to Van Buren, Aug. 11, 1831, stating that Maj. Lewis (Jackson's secretary) "sent me a letter once upon the subject containing an express promise of the President"; letter of Maj. W. B. Lewis to Van Buren, April 22, 1859.

preëminent professional qualifications, in their desire to punish him for his acts as an executive official. "Will the Senate oppose the nomination? Can they approve it, without contradicting virtually, by the act of approval, the sentence they passed on Mr. Taney's outrageous violation of the law and the Constitution, while he was in the Cabinet? The President has no expectation that the Senate will approve; he does not even wait for their approbation, except inasmuch as it would, in effect, reverse the former decision. If the Senate approve, the President and his tools may boast of their ingenuity in procuring a reversal of the sentence of condemnation in this circuitous manner; if the Senate object, the circumstances will furnish new topics for the vituperative propensity of the President," said a Boston Whig paper. Another said: "We hope that the Senate will not only apply the veto to the pretensions of this man, but that it will pass a decided resolution to oppose the elevation of any man who is not perfectly sound in regard to the fundamental principles of the Constitution as expounded by Daniel Webster." [1] A New York paper said, referring to the previous rejection of Taney's appointment as Secretary of the Treasury: "Is it to be supposed that the same Senate who had deservedly rejected him will now approve his nomination as an expounder of the Constitution? The idea is ridiculous. . . . Mr. Taney will be rejected, and I should think promptly rejected. It is true there is a kindly feeling in the Senate at this moment and a desire on the part of the Whigs to avoid collision, but not by a sacrifice of principle. . . . It is full time that public men should be made to feel that offices of honor and emolument are not in the gift solely

[1] *Columbian Centinel*, Jan. 22, 1835; *Washington Globe*, Feb. 11, 1835; *Boston Courier*, Jan. 22, 1835; *New York Courier*, Jan. 19, 1835.

of the Executive, and that subserviency to his will or truckling to his behests is not enough to secure to them the reward they anticipated." That these criticisms were due to the partisan spirit of the times and not to doubt of Taney's legal qualifications is clearly shown by the fact that Chief Justice Marshall himself, looking solely to the legal phase of the appointment, was favorable to Taney's confirmation.[1]

As it appeared that the vote in the Senate would be very close, Taney's opponents determined to evade the problem presented by the nomination, by an ingenious indirect method of shelving it.[2] There was pending in Congress at this time a bill to extend the Circuit Court system to the States of Louisiana, Alabama, Mississippi, Missouri, Illinois and Indiana, which States had long been unjustly deprived of any Circuit Court.[3] The resignation of Judge Duval now presented an opportunity to make this provision, without enlarging the number of Judges on the Court, through the device of combining the States in Judge Duval's

[1] Marshall wrote to Senator Leigh of Virginia: "If you have not made up your mind on the nomination of Mr. Taney, I have received some information in his favor which I would wish to communicate." *Taney*, 240.

[2] Webster wrote to Jeremiah Mason, Jan. 22, 1830: "I am busy in the Court. Mr. Taney is yet before us. Probably will not be confirmed; but that is not certain." *Webster Papers MSS.* On Feb. 1, 1835, he wrote to Mason: "Mr. Taney's case is not yet decided. A movement is contemplated to annex Delaware and Maryland to Judge Baldwin's Circuit and make a Circuit in the West for the Judge now to be appointed. If we could get rid of Mr. Taney on this ground, well and good; if not, it will be a close vote." *Letters of Daniel Webster* (1902), ed. by C. H. Van Tyne.

[3] Van Buren had written to Jackson, Aug. 7, 1834, suggesting that the appointment of a successor to Judge Johnson be postponed in order to see if Congress would not remodel the Circuit system so as to embrace the six Western and Southwestern States. "The wonder is that they have submitted to it so quietly," he said. "Neither party has hitherto been willing to incur the responsibility of increasing the Judges, or both are unwilling to leave to its adversary the appointment of new ones. It is to one or both of these causes that this unequal and unjust state of things has been allowed to continue." See also letter of Van Buren to Jackson, Nov. 5, 1834, again urging that the Circuit system be changed; that no new Judges be created, but that Maryland be thrown into the Virginia Circuit and Johnson's and Duval's Circuits be divided among the six Southwestern and Western States. *Van Buren Papers MSS.*

Circuit, Maryland and Delaware, with the Third Circuit which then consisted of New Jersey and Pennsylvania. As Judge Baldwin represented on the Court the proposed consolidated Circuit, the possibility of Taney's confirmation would be automatically disposed of. "The great and serious obstacle," said Senator Frelinghuysen, "which has stood in the way of the claims of the West has been the difficulties and dangers of enlarging the Court to the number that was desired. It was a well-founded apprehension that such enlargement would impair the energy and moral influence of the Court. A door is now opened by which all these dangers are avoided." President Jackson's friends in the Senate, particularly Benton of Missouri, Buchanan of Pennsylvania and Bibb of Kentucky, opposed the project, and advocated a bill providing for two new Judges and two new Western Circuits. A single Western Circuit composed of six States, said Benton, would be a "perfect monstrosity . . . which extended from the Gulf of Mexico to Lake Michigan, from the torrid to the frigid zone"; he said that he did not know "how the Judge was to be shot from one end of the Circuit to the other"; he thought that we ought to wait "till we have arrived at a greater art in aerial navigation" or "perhaps the Judge might in his journeys south be transported by one of those flights of wild geese which periodically emigrate from the North, if he could manage to have his car attached to them." The bill finally passed the Senate, abolishing the Fourth Circuit and providing one new Judge of the Supreme Court and two new Western Circuits. In the House, however, Jackson's friends rallied, and after arguing that the bill was simply intended "to destroy one of the worthy citizens of Maryland", "to relieve the Senate of a responsibility imposed upon them by the Constitu-

tion", "to affect injuriously the interests of Maryland and to crush one of her most valued citizens", they succeeded in defeating it.[1]

Taney's nomination being thus forced to a vote, it was taken up by the Senate on the last day of the session and was rejected.[2] "The Senate, which has been for the last four years but a council of war in which three disappointed Presidential aspirants have united their influence and abilities in devising schemes to break down the Administration, maintained its savage temper to the last," said the *Globe*. And so incensed was President Jackson at his defeat that, though he was in the Capitol at the time, he refused to make another nomination. It was even stated in a contemporary newspaper that when, on the night of March 3, the Clerk of the Senate "announced to the President the rejection of Mr. Taney, he replied that it was past twelve o'clock and he would receive no message from the damned scoundrels."[3]

At the 1835 Term of the Court, while Taney's nomination was pending, little business of importance was transacted, and Judge Story wrote, March 2: "We are approaching the close of the session of the

[1] See *23d Cong., 2d Sess.*, Jan. 15, Feb. 6, 11, 23, 24, 25, March 3, 1835. The *United States Telegraph* said, March 6, 1835: "This bill has been claimed as an act of justice to the West and Southwestern States. It was urged by Mr. Adams and then defeated only because the majority was unwilling to trust him with the nomination of Judges. It was again urged by General Jackson and again defeated for the same reason; and now an occasion having arisen whereby the system may be extended by merging the Fourth Circuit and adding another Judge, reluctant as the opponents of the Administration were to place the power of filling that body in the hands of the present President, they were induced to yield to the just demands of this long neglected section, and the Judiciary bill was passed by a vote of 31 to 5. It, too, was permitted to sleep the sleep of death. And why? Because the nomination of Roger B. Taney was superceded by it."

[2] The Senate voted indefinite postponement of the nomination, March 3, 1835, by the close vote of 24 to 21.

[3] *Washington Globe*, March 5, 1835; *National Intelligencer*, March 5, 10, 1835; *United States Telegraph*, Jan. 30, 1836, quoting letters from "The Spy in Washington" in the *New York Courier*, Jan. 16, 21, 1836.

Court and have not had any very interesting business before us, though the arguments have been long and intricate; but we have now a case from Florida, involving a claim for one million, two hundred and fifty thousand acres of land, which has been under argument eight days, and will probably occupy five more. Yet I firmly believe that it ought not to have occupied one third of the time, to have developed all the merits. . . . But this is the very region of words; and Americans, I fear, have a natural propensity to substitute them for things." [1]

This was the last Term at which Chief Justice Marshall was destined to preside. "He still possesses his intellectual powers in very high vigor," wrote Story, March 2, "but his physical strength is manifestly on the decline . . . what a gloom will be spread over the Nation when he is gone! His place will not, nay, it cannot be supplied." To the Reporter, Richard Peters, Story wrote, June 19, of the "very melancholy intelligence respecting the Chief Justice's health. . . . Great, good and excellent man! I perceive we must soon, very soon, part with him forever. . . . I shall never see his like again. His gentleness, his affectionateness, his glorious virtues, his unblemished life, his exalted talents, leave him without a rival or a peer." [2] Within a few months after the Court adjourned, it became evident that the Chief Justice was rapidly failing;

[1] The case to which Story referred was *Mitchel* v. *United States*, 9 Pet. 711, docketed in 1831 and argued at this Term by White and Berrien against Attorney-General Butler. It was extraordinary, not only for the immense tract of land in litigation, but also for the very dubious character of the land claim involved — being a purchase from the Seminole Indians in Florida by an English trading firm, claimed to have been authorized by Spanish officials in lieu of compensation for losses incurred for, and services rendered to the Spanish Crown. In this case again, the Court decided against the Government, solving all doubts in favor of the claimant, and again holding that the right of the Spanish officials to make or assent to the grant would be presumed.

[2] *Story*, II, 192, 199.

and a discussion arose in the newspapers as to his possible successor. For several years past, the name of Daniel Webster had been everywhere in the public mind as the fitting candidate for the place. In 1833, a Washington correspondent had written: "Rumor says that Daniel Webster, who, in my opinion, is decidedly the greatest man in the Nation, is considered somewhat in the way of the President's candidate for the succession, and that in consequence he is to be provided for. He will not stoop to ask for anything, and it is known that nothing but the most exalted station would be considered worthy his acceptance. Under these circumstances, Chief Justice Marshall has intimated his willingness to resign, provided he can be assured that Mr. Webster will succeed him. The President is willing to give such assurance, but Mr. Webster declines entering into any arrangement on the subject. He will no doubt accept, but he declines committing himself on a subject which might give his contemplated course the appearance of being the result of a bargain." [1] In the same year a close friend of Webster wrote to him:

I have no doubt you wish to render the greatest possible services to your country within your power, and might you not contribute more towards perpetuating our free institutions on the bench of the Supreme Court, than it would be possible for you to do in the Executive Chair? What President has done as much for his country as John Marshall has, in the station he has occupied? And who has secured for himself a more imperishable fame? So long as the Judiciary shall remain unpolluted, and shall possess intelligence, the citadel will be defended against the machinations of the Executive, or the sudden convulsions of the people.

[1] *New York Courier*, Feb. 8, 1833; the *United States Telegraph*, Feb. 8, 1833, quoted the *United States Gazette* as to the "whisper that Webster is to be Chief Justice." *Webster Papers MSS*, letter of E. Whittlesey, Sept. 14, 1833; *Van Buren Papers MSS*, letter of Benton, June 7, 1835.

It is to preserve the sheet-anchor of our hope, against the withering influence of New York politics that I am opposed to Mr. Van Buren. I do not wish to see Silas Wright or Lot Clark occupying Judge Marshall's seat, nor to see their nakedness covered by his gown. You may smile at my suggestion that Silas Wright or Lot Clark, by any possibility, would be placed by any person on the bench of the Supreme Court of the United States. If to sustain the party, the appointment of either should be necessary, it would be made; and so great is the power of the New York party discipline, that if the Executive should think proper to elevate either of the persons named, from personal considerations, or personal friendship, he would be justified by acclamation.

Early in the year 1835, Senator Thomas H. Benton began to be frequently mentioned as a probable nominee for the position; but Benton himself disclaimed his candidacy, and writing on June 7, to Van Buren, he said: "I see that Walsh and some others are tormenting themselves with a story of their own invention that I am to succeed Ch. Justice Marshall when death makes a vacancy. Now, my dear sir, these fellows are no more able to comprehend me than old hack lawyers, according to Burke, are able to comprehend the policy of an empire, and that was no more than a rabbit, which breeds twelve times a year, could comprehend the gestation of an elephant, which carries two years. So of these fellows and me. Dying for small offices themselves, they cannot understand that I can refuse all, even the Chief Justiceship of the Supreme Court; for, rest assured, that I should not take it, if it was offered to me. Taney is my favorite for that place, and P. P. Barbour next. . . . The Chief Justice ought to resign. The elevation of the station requires that a man should descend from it with grace and dignity, instead of hanging on until he tumbles off."

On July 6, 1835, the fears of the country were fatally realized, for on that day John Marshall died in Philadelphia, at the age of eighty and after thirty-four years' service on the Bench. The sorrow which spread throughout the land was almost universal, shared by lawyers and laymen alike, and the warm tributes which were paid to the dead Chief Justice were well depicted by a Philadelphia paper as follows: "As the intelligence of the death of the late Chief Justice extends throughout the Union, fresh testimonials are everywhere afforded of the almost universal veneration in which his illustrious character is held, as well as of the grief which is experienced at the loss sustained by the Nation in his decease. A nearly unanimous chorus of fervent eulogy and heartfelt regret is resounding on every side. The journals of all kinds, with but one or two exceptions, utter the same language of reverence; and meetings, without distinction of party, are everywhere assembled, breathing the same admirable spirit. All this speaks well for the country. It shows that however pernicious may have been the operation of faction and other causes upon the practice, it has not yet destroyed the knowledge of what is right in the land." [1]

Though the greatness of his work in the Court, and of its influence in building up a strong Union, had not at that time been as fully appreciated as it has in subsequent years, nevertheless, many of his contemporaries had already paid high tribute to his powers. His opinions on the construction of the Constitution, wrote Jeremiah Mason to Story in 1828, "constitute the stronghold for the Chief Justice's fame, and must sustain it while the Constitution of the country remains. . . . They have done vastly more for the stability

[1] *National Gazette*, July 25, 1835.

and permanency of our system of government than the present generation is aware of. The principles involved in those decisions are constantly developing themselves with increased importance. If our Constitutions ever get to definite and well-settled constructions, it must be chiefly effected by judicial tribunals. . . . Hence the vast importance that the early decisions of the Supreme Court should be rested on principles that can never be shaken." And in 1833, Mason had said: "If John Marshall had not been Chief Justice of the United States, the Union would have fallen to pieces before the General Government had got well under way. . . . John Marshall has saved the Union, if it is saved." [1]

Amidst the general tributes of respect, praise and grief which appeared in the newspapers of the country, Democratic and Whig alike, there were, however, a number of Democratic papers of the radical type which hailed the opportunity now presented for the appointment of a new Chief Justice.[2] The *New York Evening Post*, edited by the able journalist, William Leggett, in several long editorials expressed its relief at the removal of the Chief Justice from the Bench, stating its position to be that while "we lament the death of a good and exemplary man, we cannot grieve that the cause of aristocracy has lost one of its chief supporters." Its first editorial said:

> Judge Marshall was a man of very considerable talents and acquirements and great amiableness of private character. His political doctrines unfortunately were of the ultra-federal or aristocratic kind. He was one of those, who, with Hamilton, distrusted the virtue and intelligence of the people, and was in favor of a strong and vigorous General Government

[1] *Mason*, 313, letters of Feb. 16, 1828; *ibid.*, 172–173. See also an account of Marshall's work in *North American Review* (Jan., 1836), XLII.

[2] *New York Evening Post*, July 8, 10, 13, 28, 1835; *Collection of the Political Writings of William Leggett* (1840), by Theodore Sedgwick, Jr.

at the expense of the rights of the States and of the people. His judicial decisions of all questions involving political principles have been uniformly on the side of implied powers and a free construction of the Constitution. That he was sincere in these views, we do not express a doubt, nor that he truly loved his country; but that he has been, all his life long, a stumbling block and impediment in the way of democratick principles, no one can deny; and his situation, therefore, at the head of an important tribunal, constituted in utter defiance of the very first principles of democracy, has always been to us, as we have before frankly stated, an occasion of lively regret. That he is at length removed from that station is a source of satisfaction, while at the same time we trust we entertain a proper sentiment for the death of a good and exemplary man."

Two days later, in answer to attacks, it further explained its sentiments as follows:

That a man so aristocratick in his views on Government as John Marshall should occupy a place where his opinions could be, and were, exercised so prejudicially to the cause of democratick principles, was necessarily an occasion of deep regret to us. We should have been pleased had he been removed long ago, and are pleased that he is removed at last. But we never desired that he should be removed by death; and now that he is taken away in ripe old age, we regret his demise as that of an eminent and exemplary man; at the same time we view the circumstance, politically, as auspicious to the cause of those great principles of democratick government which furnish, in our judgment, the only stable foundation for the equal rights of mankind.

The sentiments, so expressed, received violent condemnation, especially from the leading Whig papers. The *New York Courier* said, July 17: "The brutality of the *Evening Post* is meeting bitter rebuke from every quarter of the Union where its infamous notice of the death of Chief Justice Marshall has reached"; and it spoke of the editor as in an "insulated position of infamy", and termed the article "an atrocious out-

pouring of partisan venom", "the ravings of a mad man", "the gloating over the melancholy event as a most important and desirable democratic triumph." The *National Gazette* of July 11, replying to the arguments of the *Post*, asked: "What has democracy or federalism or any other party appellation to do with the tribunal of justice? What discrimination of the kind has the divinity ever been known to make among those who appear before her judgment seat? Nothing shows better the spirit by which the adversaries of the Chief Justice are actuated than this endeavor to breathe the polluted breath of party upon the spotless ermine."

In explanation of its position, the *Post* stated, in a long editorial on July 28, that its views had been misunderstood; that it joined in the expressions of general respect and regard and it noted with pleasure the public and spontaneous demonstrations of honor for Marshall's character and talent; nevertheless, it said:

> We cannot so far lose sight of those great principles of government which we consider essential to the permanent prosperity of man as to neglect the occasion offered by the death of Judge Marshall to express our satisfaction that the enormous powers of the supreme tribunal of the country will no longer be exercised by one whose cardinal maxim in politics inculcated distrust of popular intelligence and virtue, and whose constant object in the decision of all constitutional questions was to strengthen government at the expense of the people's rights. The hackneyed phrase *de mortuis nil nisi bonum* must be of comprehensive meaning indeed, if it is intended that the grave shall effectually shelter the theoretic opinion and official conduct of men from animadversion as well as the foibles and offences of their private lives. . . . Paramount consideration seemed to us to demand that in recording the death of Judge Marshall and joining our voice to that of general eulogy on his clear and venerable name, we should at the same time record our

rooted hostility to the political principles he maintained and for the advancement of which he was able to do so much in his great office. . . . The articles of his creed if carried into practice would prove destructive of the great principle of human liberty and compel the many to yield obedience to the few. . . . Of Judge Marshall's spotless purity of life, of his many estimable qualities of heart and of the powers of his mind, we record our hearty tribute of admiration. But sincerely believing that the principles of democracy are identical with the principles of human liberty, we cannot but experience joy that the chief place in the supreme tribunal of the Union will no longer be filled by a man whose political doctrines led him always to pronounce such decision of constitutional questions as was calculated to strengthen government at the expense of the people. We lament the death of a good and exemplary man but we cannot grieve that the cause of aristocracy has lost one of its chief supports.

In subsequent issues, the *Post* referred to the "floodgates of vulgar abuse" which had been opened upon it, the "bitterness and malignity" with which it had been answered, the terms which had been applied to it of "fiends", "hyenas", "vampires", "miserable maniac", "atrocious outpouring of partisan venom", "ruffianism rankling in his own ruffian breast." Finally, answering an article in the *New York American*, which had pointed out that when Marshall stood out against the monopoly in the steamboat case of *Gibbons* v. *Ogden*, he could hardly be termed "aristocratick", and which had asked for "the definition of aristocracy and democracy as applied to a tribunal of law", the *Post* stated its creed as follows: "That tribunal is aristocratick which in its decisions of constitutional questions seeks to give powers by implication to the General Government at the expense of the reserved rights of the people; and that tribunal is democratick which keeps constantly in mind that the powers not delegated to the United

States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people." [1] Since the statement has been frequently made that the *Post* and the *Washington Globe* were the only papers which expressed unfavorable views of Marshall at the time of his death [2] it may be noted that these views were entertained by a number of other papers in States where Marshall's constitutional doctrines had long been obnoxious. Thus a leading Ohio paper said that although it respected his talents, his patriotism and purity of motives, and was willing to say "Peace to his ashes!" it wished to express its decided dissent from his doctrines on the Constitution; for "they were of the ultra-federal cast and have had a greater tendency to warp that great charter of our rights than the opinions of any other man, owing to the ability and consistency with which they were advanced." Another Ohio paper said that "with all his virtues, with all his learning and his patriotism . . . his elevation to and long continuance in the office of Chief Justice was an injury to our institutions . . . and it may safely be affirmed that the decisions of John Marshall on the Bench have done more to consolidate this government and destroy the rights of the States than all the wild legislation of Congress." A South Carolina paper said that while his memory was revered and cherished for his learning, ability and ardent attachment to his country, "yet a respectful difference of opinion upon the fundamental principles of government from those

[1] *New York Evening Post*, July 29, Aug. 3, 7, 1835.

[2] *Niles Register* said editorially, referring to the *Post* editorials, that it was "happy to say it is the only thing of the sort that we have seen." The *National Intelligencer*, Aug. 15, 22, 1835, spoke of the attack on Marshall in the *Washington Globe*, as a "single discordant note." The *New York Courier* said July 17: "We have not looked into a paper save the *Post* that has not done full justice to his high character and lamented his death as a public calamity — Whig or Tory, Van Buren paper, Webster paper or White paper, all parties and all shades of parties have spoken in unison."

expressed by him will be entertained by a great majority of the American people." A North Carolina paper said that Marshall had "a spirit of hostility and inflexible opposition to Democracy." A Maine paper said that Marshall's removal was "a source of satisfaction", as he was kept in place by those "opposed in every way to Democratick principles." [1]

As against these comparatively few instances of failure to lament the death of the Chief Justice, there may be set two remarkable tributes from opponents. "An old Democrat of '98 and one who had been opposed to the political views of Judge Marshall all his lifetime remarked that there had been but one solitary instance, during his whole term of thirty-four years judicial service, in which the impartiality of the Judge had been impugned — the Burr trial." [2] And Andrew Jackson, to whom the constitutional doctrines of the Chief Justice represented all that was abhorrent politically, wrote to a committee who had invited him to be present at an address to be delivered by Horace Binney in memory of Marshall: [3]

I acknowledge with much satisfaction the receipt of your note of the 15th inst.; inviting me to hear the eulogy which Mr. Binney, at the request of the Select and Common Councils of the city of Philadelphia, is to pronounce on the life and character of the late Chief Justice of the United States. Having set a high value upon the learning, talents and patriotism of Judge Marshall, and upon the good he has done his country in one of its most exalted and responsible offices, I have been gratified at seeing that sentiments equally favorable have been cherished generally by his fellow citizens, and that there has been no disposition, even with those who dissent from some of his expositions of our constitutional

[1] See *Ohio Patriot; Western Hemisphere* (Columbus, Ohio); *Columbia Sentinel* (S. C.); *Fayetteville Green Mountain Democrat* (N. C.); *Ellsworth Patriot* (Me.), quoted in *New York Evening Post*, July 22, 23, 24, Aug. 15, 18, 1835.

[2] *New York Courier*, July 9, 1835.

[3] *Jackson Papers MSS*, letter of Sept. 18, 1835.

law (of whom it is perhaps proper that I should say I am one), to withhold from his memory the highest tribute of respect. In the revolutionary struggles for our National independence, and particularly in the subsequent discussions which established the forms and settled the practice of our system of Government, the opinions of John Marshall were expressed with the energy and clearness which were peculiar to his strong mind, and gave him a rank amongst the greatest men of his age which he fully sustained on the bench of the Supreme Court. With these views of Judge Marshall's character, it is a source of regret that my public duties will not allow me to be one of Mr. Binney's auditors on the interesting occasion to which you have been pleased to invite me.

"Chief Justice Marshall was the growth of a century," said Story. "Providence grants such men to the human family only on great occasions to accomplish its own great end. Such men are found only when our need is the greatest." [1] "His proudest epitaph may be written in a single line — 'Here lies the expounder of the Constitution.'" [2] But while it is impossible to exaggerate Marshall's service to his country in vitalizing the Constitution and making it a stronger bond of Union, it must be admitted that the time had arrived when

[1] *Life of Rutherford Birchard Hayes* (1914), by Charles R. Williams, diary entry, Sept. 16, 1843.

[2] Between 1801 and 1835, there were sixty-two decisions involving constitutional questions in thirty-six of which Marshall wrote the opinion; in twenty-three of which cases, there was no dissent. In the remaining twenty-six constitutional cases, Story wrote the opinion in eleven, Johnson six, Washington five, Paterson, Cushing, Baldwin and Thompson in one each. Of a total of one thousand two hundred fifteen cases during that period, in ninety-four, no opinions were filed; in fifteen, the decision was by the Court; and in the remaining one thousand one hundred six cases, Marshall delivered the opinion in five hundred nineteen, and he filed a dissent in only nine cases.

In the same period there were one hundred ninety-five cases involving questions of international law or in some way affecting international relations. In eighty of these, the opinion was delivered by Marshall, in thirty by Story; in twenty-eight by Johnson, in nineteen by Washington, in fourteen by Livingston, in five by Thompson, and one each by Baldwin, Cushing and Duval, and in eight "by the Court." *Constitutional Development in the United States as Influenced by Chief Justice Marshall* (1889), by Henry Hitchcock; *Address* by John Bassett Moore, before the Delaware Bar Association, Feb. 5, 1901.

a change in the leadership of the Court was possibly desirable. For at least thirty-one out of his thirty-five years as Chief Justice, Marshall had been out of sympathy with the political views predominant among the people, and inspiring the statesmen at the head of the Government. Moreover, he had never been a profound lawyer deeply grounded in the common law; and he had possessed a highly conservative nature and mental attitude. In view of the changes and reforms which were now taking place in the economic and social conditions, and the liberalization of political sentiment and processes which was marking a new era in the country's development, he was clearly out of touch with the temper of the times and less fitted to deal with the new problems of the day than with the great constitutional questions of the past. This phase of the situation must be regarded, in any correct appraisal of the struggle which ensued over the appointment of Marshall's successor.[1]

[1] See especially *John Marshall* (1919), by Edward S. Corwin, presenting a clear-sighted and unconventional view of Marshall's character, work and opinions.

NOTE. As to Jackson's personal respect for Marshall, see *Washington Globe*, Aug. 12, 1835: "The President has uniformly cherished the most friendly feelings towards Judge Marshall and has never failed to manifest them on all suitable occasions." T. W. White wrote, Aug. 1: "He took occasion to pay the motives, as also the personal character, of Mr. Marshall, a handsome, and as I well know, a just tribute." See also Jackson's statement to Biddle as to Marshall's "great and pure mind." *The Correspondence of Nicholas Biddle* (1919), 93.

Clay said as to Taney, in the House, Feb. 14, 1834 (*23d Cong., 1st Sess.*): "The very sound of the name is enough to repress every martial emotion, and to dampen all chivalrous ardor. If good currency, good reasons, or anything else good can issue from such a source, I shall be agreeably disappointed." The *Columbian Centinel* (Boston), Jan. 20, 1835, said that Duval's resignation was greatly regretted and that "Mr. Taney is the very last man that ought to be allowed to sit upon the Supreme Judicial Bench. . . . The fundamental principles of our government will be in jeopardy." Judge Story wrote, Feb. 10, 1833, however, of "fine arguments from Attorney General Taney." *Story*, II, 122.

Judge William Johnson died in Brooklyn, N. Y., August 4, 1834; see *New York Evening Star*, Aug. 5, 1834, and *Mobile Commercial Advertiser*, Aug. 30, 1834, for laudatory articles.

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